

No. 11180
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ,
as executor and executrix of the last will and testa-
ment of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY OF BOSTON, a corporation,

Appellee.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 382, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

FILED

JAN 30 1949

PAUL P. O'BRIEN
CLERK

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer of Defendants and Counterclaim of Harry Lutz	22
Exhibit A: New England Mutual Life Ins. Co. Policy	39
Answer to Counterclaim.....	47
Appeal:	
Bond for Costs on.....	68
Notice of	66
Statement of Points on.....	70
Statement of Points on (Circuit Court).....	380
Stipulation and Order Extending Time to Docket, Dated October 22, 1945.....	74
Stipulation and Order Extending Time to Docket, Dated October 31, 1945.....	75
Stipulation and Order for Transmission of Original Records	76
Bond for Costs on Appeal.....	68
Certificate of Clerk.....	77
Complaint for Rescission and Cancellation of Life In- surance Policy and for Declaratory Relief, Amended	2
Exhibit A: Letters, Dated September 26 and Oc- tober 10, 1944, to Harry Lutz.....	18
Counterclaim of Harry Lutz, Answer of Defendants and	22
Findings of Fact and Conclusions of Law.....	49
Judgment	62
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	66

	Page
Reporter's Transcript of Testimony and Proceedings on Trial, Filed August 21, 1945.....	79
Defendants' Exhibits (See Index to Exhibits)	
Plaintiff's Exhibits (See Index to Exhibits)	
Testimony on Behalf of Plaintiff:	
Arnold, Paul M.—	
Direct examination	238
Cross-examination	241
Brown, Preston B.—	
Direct examination	164
Cross-examination	170
Harris, Howard L.—	
Direct examination	228
Cross-examination	235
Ludden, H. C.—	
Direct examination.....	81
Cross-examination	94
Direct examination (recalled).....	97
Rosenfeld, Maurice H.—	
Direct examination	98
Cross-examination	133
Redirect examination	153
Seech, Stephen—	
Direct examination	155
Cross-examination	163
Testimony on Behalf of Defendants:	
Lutz, Harry—	
Cross-examination	173
Direct examination (recalled).....	180
Cross-examination	189
Redirect examination	193
Recross-examination	194

	Page
Reporter's Transcript of Testimony and Proceedings on Trial, August 21, 1945:	
Testimony on Behalf of Defendants:	
Waste, John M.—	
Direct examination	199
Cross-examination	223
Reporter's Transcript of Proceedings, Filed October 31, 1945	245
Testimony on Behalf of Plaintiff:	
Frost, Harold M. (Deposition of, see Plaintiff's Exhibit 27)—	
Direct examination	246
Cross-examination	277
Testimony on Behalf of Defendants:	
Morgan, Harold (Deposition of, see Defendants' Exhibit P)—	
Direct examination	310
Reporter's Transcript of Proceedings, Filed November 9, 1945:	
Transcript of Court's Opinion, Dated May 4, 1945....	352
Stipulation and Order Extending Time to Docket Ap- peal, Dated October 22, 1945.....	74
Stipulation and Order Extending Time to Docket Ap- peal, Dated October 31, 1945.....	75
Stipulation and Order for Transmission of Original Records	76
Stipulation for Payment and Acceptance of Moneys Without Prejudice to Rights of Either Party on Appeal	64
Statement of Points on Appeal.....	70
Statement of Points on Appeal (Circuit Court).....	380

INDEX TO EXHIBITS.

Plaintiff's Exhibits:

No.	Page
1. Statement re pre-trial conference (In Evidence) (In Book of Exhibits).....	79 383
2. Original application for policy in suit (In Evidence)	80
(In Book of Exhibits).....	391
3. Original policy bearing No. 1172844 (In Evidence)	80
4. Notice of claim and proof of death on the form of New England Mutual Life Insurance Company of Boston, Massachusetts (In Evidence)..	80
(In Book of Exhibits).....	395
5. Prescription of Stephen G. Seech, M.D., dated January 15, 1943 (In Evidence).....	83
(In Book of Exhibits).....	399
6. Prescription of Stephen G. Seech, M.D., dated October 11, 1937 (For Identification).....	83
(In Book of Exhibits).....	400
7. Prescription of Henry H. Lissner, M.D., and Maurice H. Rosenfeld, M.D., dated June 1, 1942 (For Identification).....	83
(In Book of Exhibits).....	401
10. Records of Cedars of Lebanon Hospital (In Book of Exhibits).....	402
11. Records of Cedars of Lebanon Hospital (In Book of Exhibits).....	403
12. Electrocardiograms taken by Dr. Rosenfeld January 16, 1937 (For Identification).....	102
(In Evidence)	113

Plaintiff's Exhibits:

No.		Page
13.	Electrocardiograms taken by Dr. Rosenfeld June 1, 1942 (In Evidence).....	113
14.	Electrocardiograms taken by Dr. Rosenfeld June 3, 1942 (In Evidence).....	113
15.	Electrocardiograms taken by Dr. Rosenfeld June 5, 1942 (In Evidence).....	113
16.	Electrocardiograms taken by Dr. Rosenfeld July 6, 1942 (For Identification)..... (In Evidence)	114 129
17.	Electrocardiograms taken by Dr. Rosenfeld June 12, 1942 (For Identification)..... (In Evidence)	115 129
18.	Electrocardiograms taken by Dr. Rosenfeld August 10, 1942 (In Evidence).....	129
19.	Letter, dated March 9, 1943, from Northwest- ern National Life Insurance Company to Dr. Rosenfeld (In Evidence).....	130
20.	Document, dated June, 1944, containing signa- ture of Harry Lutz (For Identification)..... (In Evidence)	239 239
	(In Book of Exhibits).....	404
27.	Deposition of Harold M. Frost:	

Plaintiff's Exhibits:

No.

1.	Application of Abe Lutz (For Identifica- tion)	255
	(In Book of Exhibits).....	405
1A.	Work sheet (For Identification)..... (In Book of Exhibits).....	256 407

Plaintiff's Exhibits:

No.	Page
27. Deposition of Harold M. Frost:	
Planitiff's Exhibits:	
No.	
2. Report of Medical Examiner, November 16, 1942 (For Identification).....	257
(In Book of Exhibits).....	408A
3. Report of Urinary Analysis (For Identifi- cation)	257
(In Book of Exhibits).....	409
4. Letter, November 25, 1942, signed Robert M. Daley, M.D. (For Identification).....	258
(In Book of Exhibits).....	410
5. Letter, December 8, 1942, Harold P. Mor- gan to Doane Arnold (For Identification) ..	275
6. Letter, December 24, 1942, Harold P. Mor- gan to Doane Arnold (For Identification)	276
7. Letter, April 5, 1943, Harold P. Morgan to Dr. Frederick R. Brown (For Identifi- cation)	297

Defendants' Exhibits:

No.	
1. Letter, November 16, 1942, Harold P. Morgan to Doane Arnold (For Identifica- tion)	277
2. Attending physicians statement (For Iden- tification)	278
3. Telegram, November 19, 1942, New Eng- land Mutual to Equitable Life Assurance Society (For Identification).....	279

Plaintiff's Exhibits:

No.	Page
-----	------

27. Deposition of Harold M. Frost:

Defendants' Exhibits:

No.

4. Letters, November 16 and 17, 1942, Harold P. Morgan to Doane Arnold (For Identification)	280
5. Telegram, December 1, 1942, Underwriting Department to New England Mutual at Los Angeles; letter, December 1, 1942, Doane Arnold to Hays & Bradstreet; telegram, April 8, 1943, New England Mutual to New England Mutual of Los Angeles (For Identification)	282
8. Attending physician's statement (For Identification)	289
11. Letter, December 14, 1942, H. M. Frost to Hays & Bradstreet (For Identification)	282
12. Letter, January 14, 1943, F. R. Brown to Hays & Bradstreet (For Identification)....	282
13. Telegram, December 29, Home Office to New England Mutual at Los Angeles (For Identification)	283
28. Chart of Jaeger's Test (In Evidence).....	228
29. Agency contract, June 28, 1938, between plaintiff insurance company and Hays & Bradstreet; and supplementary agreement, dated June 28, 1938, between same parties (In Evidence).....	243
(In Book of Exhibits).....	413

Defendants' Exhibits:	Page
A. Four sheets of memoranda of Dr. Rosenfeld (For Identification)	133
B. Copy of document from deposition of Dr. Rosenfeld (For Identification)..... (In Evidence)	149 328
C. Certified copy of local death record of Mr. Lutz (For Identification)	150
(In Evidence)	152
(In Book of Exhibits).....	419
D. [See Plaintiff's Exhibit 27] (In Book of Ex- hibits)	421
E. Letter, dated December 31, 1942, addressed to Mr. Stanley Leeds and signed Harold P. Mor- gan (For Identification).....	307
H. Telegram to New England Mutual Life Insur- ance Company, 609 South Grand, Los Angeles, from the Underwriting Department (For Iden- tification)	320
I. Letter from New England Mutual Life Insur- ance Company, dated December 1, 1942, from the manager of the Underwriting Department (For Identification)	322
J. Letter, dated December 8, 1942, from Harold P. Morgan to Mr. Doane Arnold (For Identifica- tion)	325
K. Plaintiff's letter, dated December 14, 1942, to Hays & Bradstreet, signed H. M. Frost, Medical Director (In Evidence).....	328

Defendants' Exhibits:	Page
L. Letter, dated December 24, 1942, from Harold P. Morgan to Dr. Harold M. Frost (In Evidence)	332
M. Telegram to New England Mutual Life, 609 South Grand, Los Angeles, from New England Mutual Life Insurance Company (For Identification)	335
N. Letter, dated January 14, 1943, from New England Mutual Life Insurance Company from F. R. Brown, Associate Medical Director (For Identification)	336
O. Blank copy of attending physician's statement of the New England Mutual Life Insurance Company (For Identification).....	350
P. Deposition of Harold Morgan (In Evidence)....	242

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In the District Court of the United States
Southern District of California
Central Division

No. 3930 R. J.—Civil

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY OF BOSTON, a corporation,

Plaintiff,

vs.

HARRY LUTZ and HARRY LUTZ and ROSE
LUTZ as executor and executrix of the last will and
testament of Abe Lutz, Deceased,

Defendants.

AMENDED COMPLAINT FOR RESCISSION AND
CANCELLATION OF LIFE INSURANCE
POLICY AND FOR DECLARATORY RELIEF

Comes now the above named plaintiff, New England Mutual Life Insurance Company of Boston, a corporation, and leave of court and the written consent of the adverse parties having been first obtained, files herein its amended complaint against defendants above named, and for cause of action complains and alleges as follows:

I.

That plaintiff is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts and engaged in and duly authorized by the laws of the State of California to engage in the business of life insurance in said State of California. [2]

II.

That the amount in controversy herein exceeds the sum of \$3,000, exclusive of interest and costs.

III.

That the jurisdiction of this court depends upon diversity of citizenship and upon the fact that the amount herein in controversy exceeds the sum of \$3,000, exclusive of interest and costs.

The within action is a controversy between citizens of different states, to-wit, New England Mutual Life Insurance Company of Boston, a corporation, plaintiff herein, which is and at all times herein mentioned was a citizen, resident and inhabitant of the State of Massachusetts, and defendants, Harry Lutz, individually, and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, who are and at all times herein mentioned have been citizens, residents and inhabitants of the State of California, residing within the subdivision of the Southern District of California of the within entitled court.

IV.

That plaintiff company, on information and belief, alleges that Harry Lutz and Rose Lutz are the duly appointed, qualified and acting executor and executrix of the last will and testament of Abe Lutz, deceased, duly admitted to probate in the Superior Court of the County of Los Angeles, State of California, in proceedings entitled in the Matter of the Estate of Abe Lutz, deceased, numbered 233176 on the records and files of said court.

V.

That on or about the 14th day of November, 1942, one Abe Lutz made application in writing to plaintiff company for a policy of insurance on his life; that said application was in writing and was signed by said Abe Lutz; that a full, true and [3] correct copy of said application, together with the answers made to the medical examiner, hereinafter referred to, and which constituted a part thereof, is attached to and made a part of a policy of life insurance issued on the life of Abe Lutz, being numbered and described as policy 1 172 844 of plaintiff company, and hereinafter identified and described.

VI.

That on or about the 16th day of November, 1942, in furtherance of and in connection with and as a part of said application for insurance, and for the purpose of inducing plaintiff company to issue a policy of insurance on his life, said Abe Lutz presented himself to the medical examiner of plaintiff company for medical examination and was then examined by said medical examiner of plaintiff company and made certain answers to said examiner in writing and signed the same. That said answers to said medical examiner were made a part of said application for insurance and a full, true and correct copy thereof is attached to and included in and made a part of a policy of insurance issued on the life of Abe Lutz and identified as policy number 1 172 844 of plaintiff company and as hereinafter described.

That at the date and time of making said application for said policy of insurance and as a part thereof, said applicant, Abe Lutz, requested that any policy to be thereafter issued be post-dated to October 13, 1942, in order

to be issued to said Abe Lutz as of the age sixty-four, and with request to prorate eleven months' premium and thereafter to be paid on an annual basis.

VII.

That subsequent to the making of said application and the time of said medical examination, plaintiff company delivered its policy of life insurance numbered 1 172 844 in the face amount of \$13,000 on the Ordinary Life Plan and upon its form of policy of life insurance numbered 500. That attached to and by its terms [4] made a part of said policy, and at the time of delivery thereof to Abe Lutz, was affixed a full, true and correct copy of his application therefor and answers to medical examiner as a part of said application, all of said policy, together with said application and answers to medical examiner as a part thereof, being the full and complete contract between plaintiff and said Abe Lutz. That, as herein-before alleged, said contract is in writing. Plaintiff relies upon said policy of life insurance and the whole thereof, including said application for said policy, which is contained therein and made a part thereof. That, as before alleged, said policy is numbered 1 172 844. That in and by said policy of life insurance it was provided, among other things, that on receipt of due proof, on forms prescribed by the company, of the death of Abe Lutz, the insured named therein, plaintiff company would pay to Harry Lutz, son of the insured, or if deceased, the executors, administrators or assigns of said son, the sole owner of said policy, the sum of \$13,000, the face amount of said policy.

That the insured named in said policy of life insurance was and is Abe Lutz.

VIII.

That plaintiff company is informed and believes and upon such information and belief alleges that the insured named and described in policy, Abe Lutz, died in the City of Los Angeles, County of Los Angeles, State of California, on or about the 28th day of May, 1944.

That Harry Lutz, the beneficiary named in said policy, was then and is now alive.

IX.

That in and by said application for insurance, copy of which is attached to and made a part of said policy of insurance hereinbefore identified, and the answers therein given in writing [5] before plaintiff's medical examiner, constituting a part of said application, and for the purpose of procuring the issuance of said policy of insurance on his life, and particularly for the purpose of securing the issuance of the policy of insurance identified as policy 1 172 844 of plaintiff company, and with the understanding that plaintiff company would rely and act upon what he therein stated in his said application for said insurance, and the answers to medical examiner made as a part thereof, and with the intent to deceive plaintiff company, said Abe Lutz, in answer to certain of the questions contained in said application for insurance as a part of said policy of insurance, stated as follows:

"35. Have you ever suffered from:

A Indigestion?

Answer: "No."

"B Insomnia?"

Answer: "No."

"C Nervous strain or depression?"

Answer: "No."

"D Overwork?"

Answer: "No."

"E Dizziness or fainting spells?"

Answer: "No."

"F Palpitation of heart?"

Answer: "No."

"G Shortness of breath?"

Answer: "No."

"H Pain or pressure in the chest?"

Answer: "No."

"36 A Have you consulted, or been examined by, a physician or other practitioner within five years?"

Answer: "Yes." [6]

"B If so, give reasons, name of practitioner and details under 44."

"44 Special Information:

36—Dr. Maurice H. Rosenfeld—August, 1942—Physical Examination & Blood Sugar Determination. Report was normal."

That plaintiff company herein incorporates all of the questions and answers made in the said application for said insurance and in particular the questions asked and answers given to the medical examiner as a part of said application for insurance, with the same force and effect as if each and every part thereof were set out herein in full.

That in and by his answers to said questions, hereinbefore particularly alleged, and as contained in said ap-

plication for said insurance, said Abe Lutz falsely and fraudulently represented to plaintiff company that he had never suffered from indigestion, insomnia, nervous strain or depression, overwork, that he had never suffered or experienced any dizziness or fainting spells, that he had never suffered from or experienced any palpitation of the heart, shortness of breath, pain or pressure in the chest. That in and by his answers to said question 36, contained in said application for said insurance, said Abe Lutz falsely and fraudulently represented to plaintiff company that he had not consulted or been treated or examined by any physician or practitioner other than Doctor Maurice H. Rosenfeld, in August, 1942, and for a physical examination and blood sugar determination, with normal result, within five years last preceding the date of said application. That in fact, said Abe Lutz had consulted a physician and been examined by a physician within five years prior to the date of said application and at times other than in August, 1942, and in fact plaintiff company alleges that said Abe Lutz had consulted and been treated by physicians within five [7] years prior to the date of his said application for said insurance, for dizziness and fainting spells, palpitation of the heart, shortness of breath, pain and pressure in the chest, and that he had consulted a physician and been treated by a physician in January, 1937, for nausea and dizziness, in June of 1942 for pains in the chest, in July, 1942, for dizziness and nausea, pains in the chest, indigestion and palpitation of the heart, and for various other ailments and diseases. That said consultations and treatments were all, and each of them was, falsely and fraudulently concealed by said Abe Lutz from plaintiff company for the purpose of inducing plaintiff company to issue to him its policy of life

insurance on his life, and more particularly that certain policy of life insurance numbered 1 172 844, dated as of October 13, 1942, and in the face amount of \$13,000 and on plaintiff company's form 500.

X.

That plaintiff company did not know that said representations contained in the said application for insurance, and that the said answers made to said medical examiner as a part of said application for said insurance, or any of them, were false and untrue. That had plaintiff company known that said representations made by said Abe Lutz were false and untrue or that any of them were false and untrue, or that the answers made by said Abe Lutz to plaintiff company's medical examiner in writing as a part of said application for said insurance and signed by said Abe Lutz were false and untrue, or that any of them were false and untrue, it would not have issued said policy of life insurance herein described and identified. That had plaintiff company known that within one year preceding the date of said application for said insurance, said Abe Lutz had consulted a physician and been treated by a physician for pains in the chest, dizziness, shortness of breath and palpitation of the heart, and had plaintiff known that said Abe Lutz had in fact suffered from dizziness and fainting spells, [8] palpitation of the heart, shortness of breath, pains and pressure in the chest, it would not have issued said policy of life insurance.

That in and by said application for insurance and in and by said answers given before said medical examiner and constituting a part of said application for life insurance, and all as a part of said policy of life insurance herein identified, said Abe Lutz stated, agreed and cer-

tified, on behalf of himself and any person who shall have or claim any interest in any insurance made thereunder, that he had read all and each of the said answers made in said application for said insurance and each of said answers was full and complete and true and that they were, as stated in said application, correctly recorded; that the answers made by said Abe Lutz in his said application for insurance, all as a part of said policy of insurance herein identified, were not full or complete or true, but in that regard plaintiff company alleges that in fact the truth of each of said answers herein particularly identified and described was knowingly, wilfully and fraudulently concealed by said Abe Lutz from plaintiff company for the purpose of inducing it to issue its policy of insurance to him, and particularly the policy of life insurance herein identified and described.

XI.

That plaintiff company, believing all of said answers contained in said application for insurance to be true and complete and correctly recorded, relied and acted thereon and issued its said policy of insurance by reason thereof and not otherwise.

That said policy of life insurance herein identified and described was retained by said Abe Lutz until his death on or about the 28th day of May, 1944. Plaintiff is informed and believes and therefore alleges that since the death of said [9] Abe Lutz said policy has been and is now in the possession of the defendant Harry Lutz, the beneficiary named therein.

XII.

That said policy of life insurance was issued by plaintiff company to and on the life of said Abe Lutz and was

delivered to him without knowledge or notice of plaintiff company that any of the statements or answers contained in the application therefor or in the answers to said medical examiner as a part thereof were false, incomplete, untrue or not correctly recorded, but in reliance thereon and in the belief that said statements and answers and the answers to the medical examiner made as a part of said application for insurance were and each of them was true and complete. That had plaintiff company known or had notice or information that the said statements and answers contained in said application and in said answers to medical examiner as a part thereof were false or untrue or incomplete or not correctly recorded in any respect, or that any of them were false or untrue or incomplete or not properly recorded in any respect, plaintiff would not have issued or delivered said policy of life insurance herein identified and described as its policy number 1172844, or would it have issued or delivered any policy of life insurance to said Abe Lutz. That said policy of life insurance was delivered to said Abe Lutz by plaintiff company in the belief that each and all of the statements and answers by said Abe Lutz contained in said application for said insurance and in the answers to said medical examiner as a part thereof were and each of them was true, and in reliance thereon and not otherwise.

XIII.

That after the death of said Abe Lutz, the insured in said policy of insurance, and whose death occurred on or about May 28, 1944, and after the date of receipt by it of proofs of death of said Abe Lutz, plaintiff company for the first time [10] received information leading it to believe that the statements and answers made by said

Abe Lutz in his lifetime and as contained in said application for said insurance and the answers to said medical examiner as a part thereof were not true and were in fact false and untrue, and by reason thereof plaintiff caused an investigation to be made to determine whether said answers were true, as therein set forth and contained, or were false and untrue. That as a result of said investigation and examinations plaintiff company first learned that the representations, statements and answers made in writing by said Abe Lutz in order to secure the issuance and delivery of said policy of life insurance to him were false and untrue and that said Abe Lutz had, prior to the date of said application for said insurance, suffered from, had consulted a physician for, and been examined by a physician for indigestion, dizziness and fainting spells, palpitation of the heart, shortness of the breath and pains and pressure in the chest and had, within approximately one year prior to the date of said application and other than in August, 1942, consulted a physician and been treated by a physician for, and had suffered from each and all of the ailments hereinabove particularly described and alleged.

That promptly thereafter plaintiff company elected to and did rescind said policy of life insurance on account of the misrepresentations and concealments aforesaid and notified defendants of its election to rescind said policy of insurance by letters to defendant Harry Lutz dated September 26 and October 10, 1944. Full, true and correct copies of said letters and notices of rescission dated September 26 and October 10, 1944, from plaintiff company to said defendant are attached hereto, marked herein as Exhibit "A" and by this reference made a part hereof as though set forth herein at length. That at the time of

said notification plaintiff company tendered to defendant Harry Lutz the full amount [11] of the premiums collected by it on account of the issuance of said life insurance policy herein described, together with interest thereon. That said tender was made by plaintiff company in the form of a check payable to the order of defendant Harry Lutz in the sum of \$2523.43, representing premiums received by plaintiff company on policy 1172844, together with interest thereon from the date of receipt thereof to the date of said tender. That said amount represented and represents the entire consideration received by plaintiff company for or on account of said policy of life insurance together with interest thereon from the date of the receipt thereof to the date of said tender.

That plaintiff is informed and believes and on such information and belief alleges that defendants, or either or any of them, did not object to the form of said tender but refused and declined to accept said tender and still refuse and decline to accept said tender. That at the time of making said tender plaintiff company offered and now offers to do whatever else it ought to do in the premises for the purpose of rescission of said contract of insurance and for the purpose of restoring the status quo of the parties.

XIV.

That in and by said policy of life insurance, issued and delivered by plaintiff company to Abe Lutz as aforesaid, which said policy plaintiff is informed and believes and therefore alleges is now in the possession of defendant Harry Lutz, it was agreed by plaintiff company that said policy should be incontestable after two years from the date of issuance thereof except for non-payment of

premiums; that a period of two years has not elapsed since the date of issuance of said policy of life insurance herein identified and described, but that said period is about to elapse. That after the expiration of said two years from the date of issue of said policy of insurance, plaintiff [12] company will be prevented by reason of said contestable clause contained in said policy from asserting its defense of fraud in the procurement of said policy. That no action upon said policy of life insurance has been instituted by defendants against plaintiff or at all. That plaintiff company is apprehensive that if said policy is left outstanding, and that if said policy is not rescinded and cancelled, a suit or suits thereon against plaintiff will be commenced by defendants after the two-year period of contest has expired and plaintiff will be deprived of its right to contest the validity of said policy on account of fraud and misrepresentation of said Abe Lutz or at all except for non-payment of premium, and that plaintiff company will thereby suffer great hardship and irreparable injury in the premises.

XV.

That plaintiff company has no adequate remedy at law. That plaintiff company is apprehensive that if said policy of life insurance is left outstanding, said policy may cause serious injury to it. That said policy is of no force or effect and should be rescinded and cancelled.

XVI.

That the policy of life insurance involved in the within entitled action as part I of the application of Abe Lutz to plaintiff for the issuance of said policy, which said part I is a part of said policy and contract, provides that said policy and the insurance applied for by said application shall not take effect unless and until said applica-

tion is approved by plaintiff and its home office and the first premium is paid while said Abe Lutz is in good health; that said Abe Lutz was not in good health at the time said policy was approved, or at the time said policy was issued, or at the time the first premium thereon was paid, and said policy never took effect or became effective; that said Abe Lutz at the date of the approval of said application and of the [13] issuance of said policy and of the payment of the first premium thereon was suffering from heart trouble, dizziness, fainting spells, palpitation of the heart, shortness of breath, pain and pressure in the chest, nausea, indigestion, and various other ailments.

And for a Second, Separate and Distinct Cause of Action Against Defendants for Declaratory Relief Plaintiff Alleges:

I.

Plaintiff company herein refers to the allegations contained in paragraphs I to XVI, both inclusive, of its first cause of action and incorporates said allegations herein as though set forth herein in full and at length.

II.

That plaintiff is informed and believes and on such information and belief alleges that the defendants Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, claim or will claim that any moneys to be received under said policy of insurance and in rescission thereof are the property of the estate of said decedent, Abe Lutz.

That plaintiff is informed and believes that all of the premiums paid on said policy of insurance in the lifetime of the insured, Abe Lutz, named therein, were paid by the defendant Harry Lutz, but plaintiff cannot ascertain with any certainty whose moneys paid said premiums,

that is, whether the same were paid by the insured, Abe Lutz, or by the defendant Harry Lutz.

That a case of actual controversy exists between plaintiff company and defendants with respect to the rights of defendants and the duties, liabilities and obligations of plaintiff company in and under said policy of life insurance.

III.

Plaintiff is informed and believes and on such [14] information and belief alleges that the defendants contend that plaintiff company is indebted by reason of the death of Abe Lutz, deceased, on or about May 28, 1944, for the payment under said policy of insurance numbered 1 172 844, herein described, of the sum of \$13,000. Plaintiff company contends that by reason of the facts herein alleged, it is indebted for the return of the amounts received as premiums under said policy and interest thereon from the date of receipt to the date of the tender of the return thereof, or the sum of \$2523.43, and that its liability and defendants' rights under said policy are only for a sum equal to the premiums paid to and received by plaintiff company and the interest thereon from the date of receipt to the date of tender and no more. That it cannot be ascertained as to who, legally, is entitled to the return of said last stated amount.

Wherefore, plaintiff company prays for the judgment of this court as follows:

1. That said policy of life insurance issued by plaintiff company to and upon the life of Abe Lutz, deceased, being numbered 1 172 844 and issued under date of October 13, 1942, in the face amount of \$13,000, be rescinded and cancelled and declared to be void and of no force and effect whatsoever.

2. That defendants be required to deliver said policy of life insurance into court for cancellation and that said policy of life insurance be cancelled and declared to be void and of no effect and be delivered up to and into the possession of plaintiff company for cancellation.

3. That defendants be declared to have no rights and that plaintiff company be declared to have no duties, liabilities or obligations under or by virtue of said policy of life insurance except that defendants, or the defendant decreed by this court, are or is entitled to receive, and plaintiff is obligated to pay to whichever of said defendants is decreed by this court entitled [15] thereto, the sum of \$1,099.90, as and being the first premium paid on said policy December 9, 1942, and \$1,199.90, as and being the premium paid October 6, 1943, together with interest thereon at the rate of seven per cent per annum from the date of receipt to the date of the tender thereof.

4. That pending the determination of this action, defendants be restrained, enjoined and prohibited from commencing or prosecuting any suit or action against plaintiff company under or on account of or based upon said policy of life insurance.

5. That plaintiff have such other and further relief as the court in equity and good conscience may deem just and proper.

6. That plaintiff company have judgment for its costs incurred herein.

MESERVE, MUMPER & HUGHES

By Shirley E. Meserve

Attorneys for Plaintiff, New England Mutual Life
Insurance Company of Boston [16]

[Verified. [17]]

EXHIBIT "A"

(Letterhead of)

"NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

Boston, Massachusetts

Walter Tebbetts
Vice President

501 Boylston Street

September 26, 1944

Mr. Harry Lutz
2500 Santa Fe Avenue
Los Angeles, California

Policy No. 1,172,844—Abe Lutz

Dear Sir:

Under date of October 13, 1942, this company issued its policy No. 1,172,844 on the life of Abe Lutz in the face amount of \$13,000 payable to you or if you did not survive the insured, to your executors, administrators or assigns. You were the applicant for the policy and its sole owner. We are advised that the insured died May 28, 1944.

I regret to inform you that the company has decided to rescind this policy because of the failure of the insured to disclose certain material facts as to his insurability at the time when the policy was issued. On November 16, 1942, the insured appeared before a medical examiner in Los Angeles and in answer to a question whether he had ever suffered from pain or pressure in the chest answered "no". When asked whether he had ever suffered from dizziness or fainting spells, he replied in the negative. He was asked whether he had consulted or been examined by a physician or other practitioner within five

years. He disclosed that he had consulted Doctor Maurice H. Rosenfeld in August, 1942, for a physical examination and blood sugar determination. He stated that the report was "normal".

The insured certified that he had read his answers to these questions, that they were true and complete and that they [18] were correctly recorded. He agreed that the insurance applied for should not take effect unless and until the application was approved by the company at its Home Office and the first premium paid while he was in good health.

The Company believed the foregoing statements and representations to be true and in reliance thereon issued the above-numbered policy.

The company has recently discovered that the aforesaid statements contained in the application for this policy were not true but on the contrary were incomplete and false. It appears that the insured consulted Doctor Rosenfeld in January, 1937, for nausea and dizziness and that a diagnosis of cerebral arteriosclerosis was made. He consulted Doctor Rosenfeld again in June, 1942, for chest pain. The doctor made a tentative diagnosis of mild angina pectoris and prescribed a diabetic regime and nitroglycerin. Further consultations with Doctor Rosenfeld occurred in July and August, 1942.

The company would not have issued this policy had it known these facts. The false answers contained in the application were material to the risk assumed by it.

By reason of the fact that the insured was not in good health when the first premium was paid, this policy never took effect.

In any event the company hereby elects to rescind the policy because of said false and material representations. For the purpose of restoring the status quo, the company is ready and willing to repay to you the amount of the premiums paid on the policy, together with interest thereon at the rate of 7% per annum from the dates of payment.

The above statements are made without prejudice to any other reasons which may exist for the cancellation of said policy.

Very truly yours,

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY

By Walter Tebbetts

Vice President" [19]

(Letterhead of)

"MESERVE, MUMPER & HUGHES

October 10, 1944

Mr. Harry Lutz
2500 Santa Fe Avenue
Los Angeles, California

Re: New England Mutual Life Insurance Company,
Boston, Massachusetts, Policy #1 172 844—
Abe Lutz, Insured, Deceased

Dear Sir:

This firm acts as attorneys in this jurisdiction for New England Mutual Life Insurance Company of Boston, Massachusetts, and have referred to us for attention the

matter of the rescission of the indicated policy. You are named in said policy as beneficiary without right of revocation and therefore, we conclude, would be entitled to any of the refund of premiums paid in tender in rescission.

Enclosed herewith you will find a rescission notice, dated September 26, 1944, over the signature of Mr. Walter Tebbets, vice-president of insurer company. Enclosed herewith you will also find this firm's check to your order for the amount of \$2523.43, which amount is calculated to return to you the premiums paid on the policy and interest thereon from the date of payment to the date of this tender. If the amount is incorrect and not properly calculated, we hereby offer to add thereto as a part of said tender such additional amount as shall be required to return all premiums paid on said policy together with interest thereon at seven per cent from the date of payment to the date of tender, and on behalf of said insurer company to do whatever else in the premises that it should do in order to restore the status quo of the parties.

Very truly yours,

MESERVE, MUMPER & HUGHES

By: Shirley E. Meserve."

SEM:DEB

Enc.

Registered

Ret. Rec. Req.

[Endorsed]: Filed Jan. 31, 1945. [20]

[Title of District Court and Cause.]

ANSWER OF HARRY LUTZ AND HARRY LUTZ
AND ROSE LUTZ, AS EXECUTOR AND EXE-
CUTRIX OF THE LAST WILL AND TESTA-
MENT OF ABE LUTZ, DECEASED, TO
AMENDED COMPLAINT OF PLAINTIFF,
AND COUNTERCLAIM OF HARRY LUTZ

Come now defendants Harry Lutz and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, and expressly reserve any and all rights to object to the sufficiency of the amended complaint of plaintiff herein, or to attack, move to strike, or dismiss, or move for judgment on the pleadings, or to object to the introduction of any evidence on said complaint, and for answer to the amended complaint of plaintiff, admit, deny, and allege as follows:

Answer to First Cause of Action

I.

Admit the allegations of paragraph I.

II.

Admit the allegations of paragraph II. [21]

III.

Admit the allegations of paragraph III.

IV.

Admit the allegations of paragraph IV.

V.

Answering the allegations of paragraph V admit that on or about the 14th day of November, 1942, Abe Lutz made an application in writing to plaintiff company for

a policy of life insurance on his life; admit that a policy of life insurance was issued by plaintiff company on the life of Abe Lutz; allege that following the death of Abe Lutz the original policy of life insurance on the life of said Abe Lutz was forwarded to and surrendered to plaintiff company, and said policy of life insurance is now and at all times since said surrender has been in the possession of plaintiff company; these defendants, therefore, are not in a position to admit or deny the allegation of said paragraph V that a full, true, and correct copy of said application, together with the answers made to the medical examiner, were attached to and made a part of said policy of life insurance No. 1,172,844 of plaintiff company, and basing their denial upon that ground, deny the same; further answering the allegations of said paragraph defendants are informed and believe, and upon such information and belief allege that Abe Lutz was unable to read and write in English, except in the instance of a few words, such as his name, and that any application signed by Abe Lutz referred to in said paragraph V was not filled in or written by Abe Lutz, but that the same was filled in by Dr. John M. Waste, medical examiner of plaintiff, acting for and in behalf of plaintiff, and Stanley Leeds, soliciting agent for plaintiff company in the procuring of said policy of insurance, and in this connection, defendants further allege that Abe Lutz did not read or know the contents of said application.

VI.

Answering the allegations of paragraph VI, defendants [22] do not have sufficient knowledge or belief to enable them to answer the allegations therein contained, and basing their answer upon that ground, defendants

deny each and every allegation contained in said paragraph VI.

VII.

Answering the allegations of paragraph VII defendants admit that plaintiff company delivered its policy of insurance in the face amount of \$13,000 on the ordinary life plan, and upon its form of policy of life insurance numbered 500; admit that said contract is in writing, and that according to a photostatic copy of the original of said policy of life insurance furnished by counsel for plaintiff company, the number of said policy is 1,172,844; admit that the insured named in said policy is Abe Lutz, and that it is therein provided, among other things, that upon receipt of due proof of death of Abe Lutz, plaintiff company would pay to Harry Lutz, son of the insured, or, if deceased, the executors, administrators, or assigns of said son, the sum of \$13,000; defendants are informed and believe, and upon such information and belief allege that Abe Lutz did not write the information in the application or in the answers to the medical examiner of plaintiff company, and that he did not read, and could not read the same, and did not know the contents thereof, but that Abe Lutz did truly and correctly answer all questions asked him by the medical examiner and by the agent who filled in the application for such policy.

VIII.

Admit the allegations of paragraph VIII.

IX.

Answering the allegations contained in paragraph IX, defendants deny that Abe Lutz had any intent to deceive the plaintiff company, and, further deny that he did any of the acts or things described in paragraph IX with

intent to deceive plaintiff. Defendants admit that, according to a photostatic copy of the application [23] of said Abe Lutz for said policy of life insurance furnished by counsel for plaintiff company that the answers to the questions shown in the application for insurance appear in part as alleged in paragraph IX, but in this connection defendants do not have sufficient information or belief to enable them to answer as to whether said application truly sets forth the answers given by Abe Lutz, and, basing their answer upon this ground, defendants deny that said application accurately sets forth all of the information given by Abe Lutz to the agent and to the medical examiner of plaintiff company; defendants are informed and believe, and therefore allege, that at the time said Abe Lutz was examined by the medical examiner of plaintiff company, further and additional questions other than those appearing on the application were asked, and further and additional answers than those appearing in said application were given in response thereto by Abe Lutz and that said medical examiner of plaintiff company, subsequent to the signing of said application by Abe Lutz, prepared in writing his report of physical findings relative to his examination of said Abe Lutz, and that said report, along with other information as to the physical condition of said Abe Lutz, was considered and acted upon by plaintiff company in the issuance and delivery of said policy of life insurance.

Further answering the allegations contained in paragraph IX, defendants do not have sufficient information or belief to enable them to answer the allegations therein contained which have not been heretofore admitted, qualified, or denied, and basing their answer upon this ground, defendants deny each and every allegation contained in

said paragraph which has not been heretofore admitted or denied herein.

X.

Answering the allegations contained in paragraph X, defendants allege that they do not have sufficient information or belief to enable them to answer the allegations therein contained, and [24] basing their answer upon this ground, defendants deny each and every allegation contained in paragraph X.

XI.

Answering the allegations contained in paragraph XI, defendants admit that the policy of life insurance referred to therein was retained by Abe Lutz until his death on or about the 28th day of May, 1944, and that following said last mentioned date Harry Lutz forwarded said policy together with proof of death to plaintiff, and that plaintiff has the same in its possession.

Further answering the allegations contained in paragraph XI defendants do not have sufficient information or belief to enable them to answer the allegations which have not been hereinabove specifically admitted, qualified, or denied, and basing their answer upon this ground, defendants deny all of the remaining allegations.

XII.

Answering the allegations of paragraph XII, defendants admit that the policy of life insurance was delivered to Abe Lutz, and answering all other allegations contained in said paragraph XII, defendants allege that they do not have sufficient information or belief to enable them to answer any of such other allegations, and, basing their answer upon this ground, defendants deny each and all other allegations contained in said paragraph XII.

XIII.

Answering the allegations contained in paragraph XIII of said complaint, defendants admit the death of Abe Lutz, as alleged in said paragraph XIII, and the receipt by plaintiff of proof of claim of his death. Defendants further admit that letters, copies of which are attached to said complaint, were forwarded by plaintiff as alleged therein, and that the sum of \$2,523.43 represents the premiums received by plaintiff on said policy together with interest from the date of the receipt thereof, and that defendants did not [25] accept the tender and that they still refuse and declined to accept such tender.

Further answering the remaining allegations contained in said paragraph XIII, defendants allege that they do not have sufficient knowledge or belief to enable them to answer the allegations therein contained, which have not been hereinabove specifically admitted, qualified, or denied, and, basing their answer upon this ground, defendants deny all of the remaining allegations of said paragraph XIII.

XIV.

Answering the allegations of paragraph XIV defendants allege that the policy of insurance referred to is in the possession of plaintiff company; that the date of issuance of said policy as appears from a copy of the same furnished by plaintiff company, is October 13, 1942, and as of the date of the filing of plaintiff's amended complaint more than two years have elapsed since the date of issuance of said policy, and that all alleged reasons and grounds for avoidance or rescission of said policy of insurance, not originally asserted as reasons and grounds for avoidance and rescission of said policy in

the original complaint filed herein on October 11, 1944, are waived, and plaintiff company is estopped to assert the same; defendants rely, in that connection, upon the incontestable clause being part and parcel of said policy of insurance, which is as follows, to-wit:

“Incontestable

“This Policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for failure to pay premiums, and except as to any provision contained in any supplemental agreement attached hereto relating to additional benefits specifically granted in event of total and permanent disability or of death by accident.” [26]

admit that after the expiration of two years from the date of issue of said policy of insurance plaintiff is prevented by reason of said incontestable clause from asserting its defense of fraud in the procurement of said policy; allege that defendant Harry Lutz on or about December 7th, 1944, filed action herein to recover on said policy of insurance from plaintiff company; defendants do not have sufficient information or belief to enable them to answer the remaining allegations of paragraph XIV. and basing their answer upon that ground, deny all of the remaining allegations of paragraph XIV not herein admitted, qualified, or denied.

XV.

Answering the allegations of paragraph XV, allege that said policy of insurance is in full force and effect, and should not be rescinded and cancelled. Deny all of the remaining allegations of said paragraph XV.

XVI.

Answering the allegations of paragraph XVI, admit that the copy of said policy of insurance furnished by plaintiff company, as aforesaid, contains a provision in substance as alleged in said paragraph XVI, but allege that the reasons and grounds therein in paragraph XVI alleged have been waived by plaintiff, and plaintiff is estopped to assert the same as grounds for avoidance or rescission of said policy of insurance in that more than two years have elapsed since the date of issue of said policy and the filing of said amended complaint; that the original complaint filed by plaintiff on October 11, 1944, did not assert as grounds or reasons for the rescission of said policy of insurance a violation or breach of the provisions of part 1 of the application referred to in said paragraph XVI; deny all of the remaining allegations of said paragraph XVI not herein admitted, qualified, or denied. [27]

Answer to Second Cause of Action

I.

Answering the allegations contained in paragraph I of the second cause of action, defendants reallege and incorporate by reference their answers as given to paragraphs I to XVI, both inclusive, of the first cause of action which paragraphs I to XVI, both inclusive, are realleged by plaintiff in said paragraph I.

II.

Answering the allegations contained in paragraph II of the second cause of action, defendants allege that the premiums on the insurance policy referred to therein were paid by defendant Harry Lutz, and defendants further allege that said defendant procured and obtained the said

insurance policy on the life of his father, Abe Lutz, for the sole benefit of defendant Harry Lutz, and that the said defendant procured and obtained the said insurance policy in good faith, and has at all times believed that the same was valid and that the proceeds of said insurance policy would be paid to defendant Harry Lutz at the time of the decease of his father, Abe Lutz.

Further answering the allegations contained in paragraph II, defendants deny each and every allegation therein contained which has not been hereinabove specifically admitted or denied.

III.

Answering the allegations contained in paragraph III of the second cause of action, defendants contend that the plaintiff is indebted to Harry Lutz in the sum of \$13,000, together with interest on said sum from May 8, 1944, and defendants deny each and every other allegation contained in said paragraph III. [28]

Affirmative Defense—Estoppel

I.

Defendant Harry Lutz procured and obtained the policy of life insurance described in plaintiff's complaint in good faith and without any intention to defraud or mislead plaintiff, and said defendant has paid all premiums on the said policy as alleged in plaintiff's complaint, believing that the said insurance policy was valid and enforceable, and that the proceeds thereof would be paid to Harry Lutz immediately following the decease of Abe Lutz. Defendants are informed and believe, and upon such information and belief allege that Abe Lutz furnished the agents and representatives of plaintiff with full, true and correct information on all matters as to which in-

formation was requested by said agents and representatives, and that Abe Lutz did not falsify or conceal any matter or fact concerning which he was interrogated.

II.

Prior to the time that said insurance policy was signed and delivered by plaintiff, plaintiff's physician and medical examiner examined Abe Lutz and determined from said examination that the health and physical condition of Abe Lutz merited and warranted the issuance of such insurance policy, and plaintiff's representatives contacted the physician of Abe Lutz and obtained and had the opportunity of obtaining full, true and correct information from such physician regarding the physical condition and health of Abe Lutz; that defendant Harry Lutz and Abe Lutz caused to be cancelled other insurance policies in existence on the life of Abe Lutz, believing that the said insurance policy described in plaintiff's complaint was valid and that the proceeds thereof would be paid at the time of the decease of Abe Lutz, and defendants are informed and believe, and upon such information and belief allege that plaintiff knew that such other insurance policies were cancelled and that the insurance policy described in plaintiff's complaint was taken [29] out in lieu and in place of the said other insurance policies by defendant Harry Lutz and Abe Lutz, and that said two last named parties believed that the said policy would be paid at the time of the decease of Abe Lutz. That in the event that there was any physical condition existing which would have justified the refusal of said policy, plaintiff had ample opportunity to ascertain the same and to acquaint itself with the full facts regarding the same; that by reason of the facts alleged under this defense, plaintiff is estopped to rescind or cancel the said policy or to refuse

the payment of the proceeds therefrom, and is further precluded from relief by reason of its delay in waiting until the decease of Abe Lutz before attempting to rescind or cancel the said insurance policy.

Affirmative Defense—Waiver

I.

Defendant Harry Lutz procured and obtained the policy of life insurance described in plaintiff's complaint in good faith and without any intention to defraud or mislead plaintiff, and said defendant has paid all premiums on the said policy as alleged in plaintiff's complaint, believing that the said insurance policy was valid and enforceable, and that the proceeds thereof would be paid to Harry Lutz immediately following the decease of Abe Lutz. Defendants are informed and believe, and upon such information and belief allege that Abe Lutz furnished the agents and representatives of plaintiff with full, true and correct information on all matters as to which information was requested by said agents and representatives, and that Abe Lutz did not falsify or conceal any matter or fact concerning which he was interrogated.

II.

Prior to the time that said insurance policy was issued by plaintiff, plaintiff's physician and medical examiner [30] examined Abe Lutz and determined from said examination that the health and physical condition of Abe Lutz merited and warranted the issuance of such insurance policy, and plaintiff's representatives contacted the physician of Abe Lutz and obtained and had the opportunity of obtaining all information from such physician regarding the physical condition and health of Abe Lutz which plaintiff deemed necessary; that at the time of the mak-

ing and signing of application for insurance by Abe Lutz, said Abe Lutz informed plaintiff's medical examiner and agent that Dr. Maurice H. Rosenfeld, of Los Angeles, California, was his family and attending physician, and had given him a complete physical examination, including, but not limited to, blood sugar tests; that the medical examiner of plaintiff thereupon inserted in writing the name of Dr. Maurice H. Rosenfeld, and recorded the fact that said Abe Lutz had undergone a physical examination and blood sugar determination test at the office of said Dr. Maurice H. Rosenfeld; that following the examination of Abe Lutz by plaintiff's medical examiner, in addition to the information obtained by said medical examiner, and the recording of so much of the information given by said Lutz as was deemed material by said medical examiner, said medical examiner made a thorough and complete examination of Abe Lutz, including tests of all the matters concerning which plaintiff company now claims to have been misled, or concerning which information was withheld, and a written report of the physical findings of said medical examiner were forwarded by said medical examiner to the Home Office of plaintiff company at Boston, Massachusetts; that in furnishing plaintiff company, through its medical examiner and agent, with the name of the family and attending physician of said Abe Lutz, plaintiff company had placed at its disposal the exact source from which it could obtain the information which it now maintains, by virtue of the amended complaint filed herein, was withheld from it; that notwithstanding the foregoing information given by Abe Lutz to plaintiff, [31] plaintiff company either made no investigation, or an insufficient investigation, when it could or should have, and thereupon issued the policy of insurance hereinbefore referred to, and received and kept all

of the premiums paid thereon until after the death of said Abe Lutz; that by reason of the foregoing, plaintiff company, under the provisions of Secs. 333, 334, 335, and 336 of the Insurance Code of the State of California, has waived all of the matters, facts, and things concerning which it now claims to have been misled or concerning which information was concealed, and withheld from it, by said Abe Lutz.

Third Defense—Incontestable Clause

I.

That the matters set up and alleged in paragraph XVI of plaintiff's first cause of action, and Paragraph XVI incorporated by reference in plaintiff's second cause of action, are barred by the provisions of the policy of life insurance referred to in plaintiff's amended complaint numbered 1,172,844, and particularly that provision contained in said policy in words and figures as follows:

"Incontestable

"This Policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for failure to pay premiums, and except as to any provision contained in any supplemental agreement attached hereto relating to additional benefits specifically granted in event of total and permanent disability or of death by accident."

In connection with the foregoing, defendants allege that the date of issue of said policy was October 13, 1942; that the matters set up and alleged in paragraph XVI, as afore-

said, were not asserted as a ground for rescission of said policy of insurance until after the lapse of more than two years from the date of issue of said policy, [32] said amended complaint, which for the first time contained the matter set up and alleged in paragraph XVI, as aforesaid, having been filed herein on or about January 31, 1945.

COUNTERCLAIM

Comes now defendant, Harry Lutz, and for a counterclaim against the New England Mutual Life Insurance Company of Boston, a corporation, states and alleges as follows:

I.

That the New England Mutual Life Insurance Company of Boston, is now, and has been at all times herein mentioned, a corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, and engaged in and duly authorized by the laws of the State of California to engage in the business of life insurance in said State of California.

II.

That the amount in controversy herein exceeds the sum of \$3,000, exclusive of interest and costs. The jurisdiction of this court depends upon diversity of citizenship and upon the fact that the amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs. The within action is a controversy between citizens of different states, to-wit: Harry Lutz, who is now and

has been at all times herein mentioned a citizen, resident, and inhabitant of the State of California, and plaintiff who is now, and has been at all times herein mentioned a citizen, resident, and inhabitant of the State of Massachusetts. That Harry Lutz is now and has been at all times herein mentioned residing within the Central Division of the Southern District of California of the above entitled court.

III.

That Harry Lutz is the son of Abe Lutz, now deceased, and the beneficiary named in policy No. 1,172,844, issued by plain- [33] tiff company on the life of Abe Lutz.

IV.

That on or about the 13th day of October, 1942, in consideration of the payment of the premium of \$1099.90, for the period commencing October 13, 1942, to and including September 13, 1943, and the further sum of \$1,199.90 annually thereafter, the plaintiff company, by its agents duly authorized thereto, executed its policy of insurance No. 1,172,844 in writing upon the life of Abe Lutz in the sum of \$13,000; that plaintiff company has in its possession the original policy of insurance; that there is attached hereto, here referred to, marked Exhibit "A" and made a part of this complaint a photostatic copy of said policy of insurance, the original of which Harry Lutz will rely upon at the time of trial; that under and by virtue of the terms of said policy of life insurance, plaintiff company agreed in writing, among

other things, to pay to Harry Lutz, son of Abe Lutz, or if said son should be deceased, to the executors, administrators, or assigns of said son, the sum of \$13,000 following the decease of Abe Lutz and the filing of proof of death of said Abe Lutz; that on the 28th day of May, 1944, the said Abe Lutz died in the City of Los Angeles, State of California.

V.

That up to the time of the death of said Abe Lutz all premiums accrued on said policy were fully paid.

VI.

That the said Abe Lutz performed each and all of the conditions of said policy of insurance on his part to be performed.

VII.

That the said Harry Lutz has performed each and all of the conditions of said policy of insurance on his part to be performed. [34]

VIII.

That prior to the commencement of this action notice and proofs of death of said Abe Lutz were given to plaintiff company, and demand was made upon plaintiff company for the payment of said sum of \$13,000.

IX.

That said sum of \$13,000 has not been paid nor any part thereof and the same is now due from plaintiff company to Harry Lutz, counterclaimant herein.

Wherefore, defendants pray as follows:

- (1) That plaintiff take nothing by reason of the filing of its amended complaint herein, and that defendants Harry Lutz and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, be awarded their costs and such other and further relief as to the court may seem just and proper.
- (2) That counterclaimant be awarded judgment against New England Mutual Life Insurance Company of Boston, a corporation, for the sum of \$13,000, together with interest thereon at the rate of 7% per annum from May 28, 1944, until paid, for costs and for such other and further relief as to the court may seem just and equitable.

McLAUGHLIN & McGINLEY

By John P. McGinley

Attorneys for Defendants and Cross-
Claimant. [35]

[EXHIBIT "A"]

NEW ENGLAND MUTUAL

Life Insurance Company of BOSTON

COPY

Agrees to Pay

at its Home Office in Boston, Massachusetts, on receipt of due proof of the death of the

INSURED _____ HARRY LUTZ _____ the

FACE AMOUNT *** THIRTEEN THOUSAND *** DOLLARS, to the

BENEFICIARY, HARRY LUTZ, son of the Insured, or if deceased, the executors,

administrators or assigns of said son, the sole Owner of this Policy.

The Beneficiary is appointed without right of revocation, by the Insured.

This Policy is issued in consideration of the application and of the

ANNUAL PREMIUM OF *** ELEVEN HUNDRED NINETY NINE AND 90/100 *** DOLLARS,

to be paid in advance as herein specified, and of a like premium to be paid on or before the

thirteenth day of October in each year thereafter during the life of the Insured.

The provisions hereinafter set forth are hereby made a part of this contract.

The effective date for the calculation of non-forfeiture values and dividends

is October 13, 1942 and each policy year shall begin with this date or its anniversary.

In Witness Whereof, the NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY has caused this contract to be executed at Boston, Massachusetts, on its date of issue, October 13, 1942

Morris P. Capen Secretary

George Willard Smith President

B. R. Deering
Policy Number 1,172,844

Registrar
TRUE COPY AS OF September 26, 1944
TEST 1 - Cheif C. Day ASSISTANT SECRETARY
Age at Issue 64

Life Policy

Annual Return of Surplus

Premiums Payable during Life, unless Dividends are Applied to Shorten Premium Paying Period
Cash Value May be Used to Provide Retirement Income

With War and Aviation Agreement

(Exhibit A)

Endorsements

To be made only by the Company at its Home Office

WAR AND AVIATION AGREEMENT

This Policy is issued on the express condition that the Company does not assume the risk of death under any of the following circumstances, notwithstanding any contrary provision contained in the Policy:

- (a) death from any cause, while the Insured is in service outside the forty-eight states of the United States, the District of Columbia and the Dominion of Canada, in the military, naval or air forces of any country at war, declared or undeclared; or death within six months after termination of such service, as a result of injuries incurred or disease contracted during such service;
- (b) death within two years of the date of issue of this Policy, from injuries incurred or disease contracted outside the forty-eight states of the United States, the District of Columbia and the Dominion of Canada, as a result of war, or any incident thereof;
- (c) death as a result of travel or flight in, or descent from, any kind of aircraft, in any capacity except as a fare-paying passenger on a regularly scheduled passenger flight of a licensed common carrier.

In event of any such death, the liability of the Company under this Policy and under any Double Indemnity Agreement, or under any paid-up or extended insurance, or under any Policy issued in exchange for this Policy, shall be limited to (a) premiums paid to the Company, less all dividends credited in any manner, with interest at three per cent per annum, or (b) the reserve on this Policy, whichever is greater; increased in either case by the reserve for any additions and accumulated surplus, and decreased by any indebtedness which has not been repaid in cash, and by any amount allowed as a credit in connection with a change or reduction. It, no event shall the liability of the Company exceed the amount which would be payable if this Agreement were not in effect.

The Irrefutable provision of the Policy is amended by adding the following words: *and except as to any provision of the War and Aviation Agreement.*

Endorsed on Date of Issue of Policy

MI 14

In consideration of the payment in advance as herein specified, of a pro rata premium of \$ 1099.90 for insurance to Sept. 13, 1943, it is hereby agreed that the annual premiums shall be payable Sept. 13th instead of Oct. 13th; but this endorsement shall not affect policy provisions defining policy years and adjustment of the premium for the policy year in which the insured dies.

ENDORSED on Date of Issue of Policy

Morris P. Cefon

Register of Changes in Beneficiary and Ownership

If any endorsement is made below by the Company at its Home Office, the Beneficiary and Ownership of this Policy shall be in accordance with the request referred to in the latest endorsement; the original of such request being filed with the Company and a copy attached to this Policy.

the first time in history that the world's population has reached 6 billion. This is a momentous occasion, and it is important to reflect on what it means. It is a reminder of the power of human ingenuity and our ability to overcome challenges. It is also a reminder of the responsibility we have to protect the planet and ensure that everyone has access to basic necessities like food, water, and healthcare. As we continue to grow and evolve, let us remember the importance of compassion, cooperation, and respect for all living beings.

As we look towards the future, it is clear that we must continue to work together to address the challenges we face. We must prioritize sustainable development and ensure that our actions do not harm the environment or the well-being of future generations. We must also work to reduce poverty and inequality, and to promote social justice and equality. By doing so, we can create a better world for everyone, and ensure that the legacy of our 6 billionth citizen is one of hope, progress, and a brighter future.

(The following section is a continuation of the previous page.)

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(The following section is a continuation of the previous page.)

(Exhibit A)

Benefits and General Provisions

Premiums

Premiums are payable at the Home Office, or they may be paid to an agent of the Company only upon delivery of a receipt signed by a Secretary or an Assistant Secretary and countersigned by a General Agent or Manager. Premiums are due annually in advance, but may be paid semi-annually or quarterly at the Company's rates effective at time of issue, or in such other manner as may be agreed upon with the Company. Any amount of premium paid for a period beyond the policy year in which the Insured dies shall be paid in one sum to the person entitled to receive the policy proceeds upon the death of the Insured, or for whose immediate benefit such proceeds are then being applied. In case of failure to pay any premium when due or during the period of grace, this Policy shall cease to be in force except for such values, if any, as are provided by the Non-forfeiture and Loan Provisions.

GRACE. Any premium not paid on or before its due date will be in default; but a grace period of thirty-one days, without interest, will be allowed for payment of every premium after the first, during which period the insurance shall continue in force.

REINSTATEMENT. This Policy may be reinstated at any time, unless the Policy has been surrendered for its cash value, upon production of evidence of insurability satisfactory to the Company, the payment or reinstatement of any indebtedness to the Company, and the payment of all overdue and unpaid premiums, with interest on such indebtedness and premiums at five per cent per annum, compounded annually.

Proceeds Payable

Payments by the Company under this Policy shall be made at the Home Office. The Company has the right to require surrender of the Policy at the time of claim. The proceeds payable at death shall be the face amount, increased by any additions, accumulated surplus and unpaid share of surplus, and reduced by any indebtedness to the Company on or secured by this Policy, and by any amount of unpaid premium for the policy year in which the Insured dies, even if death occurs within the grace period.

Dividends

Upon payment of the second annual premium, and annually thereafter while in force prior to maturity, this Policy shall be credited with such share of surplus as may be apportioned by the Company. Each share of surplus, or dividend, at the option of the Owner, shall be (A) payable in cash; or (B) applied in reduction of premium; or (C) used to purchase a participating paid-up addition, unless the Policy is in force as extended insurance, which addition may be surrendered for a cash value not less than the dividend; or (D) left with the Company to accumulate, with interest at not less than two and one-half per cent per annum, and payable at maturity or expiry or on demand. Any election in the application or by subsequent request shall be effective until another election is made, but if no election is in effect, the share of surplus for any year will be held by the Company at interest, as provided in D. If any premium remains unpaid at the expiration of the grace period, the Company shall apply to the payment then due the accumulated surplus under D, if sufficient to make said payment in full. If this Policy becomes a claim by death after the first policy year, a post-mortem share of surplus shall be paid.

PAID-UP OR ENDOWMENT PRIVILEGE. When the cash value of this Policy and of any additions and accumulated surplus equals the reserve of a paid-up policy of the same form and amount at the then attained age of the Insured, upon written request and release of additions and accumulated surplus, this Policy shall be endorsed as fully paid-up; or when such aggregate value equals the face amount of this Policy, upon written request and release, the net cash value shall be paid as an endowment.

Ownership and Beneficiary Provisions

The Insured, if all Beneficiaries are appointed with the right of revocation, or jointly with all Beneficiaries appointed without right of revocation, is the Owner of this Policy, unless otherwise provided. Such ownership shall be subject to any assignment on file at the Home Office of the Company. The Owner has the right,

prior to maturity of the Policy by death or as an endowment, from time to time, to change the Beneficiary and the provisions governing control of the Policy, assign the Policy as collateral security, or exercise any right, option or benefit contained in the Policy or permitted by the Company; and the rights of any Beneficiary shall be subject to any interest so created. Every request for change of Beneficiary must be in writing form satisfactory to the Company, and shall take effect as of the date of such request, but only when endorsed hereon by the Company, whether or not the Insured be living at the time of endorsement; provided that any interest so created shall be subject to any action taken or payment made by the Company prior to such endorsement. If no Beneficiary survives the Insured, the proceeds shall be payable to the executors, administrators or assigns of the Insured, unless otherwise provided.

Change of Plan

This Policy, while in full force, may be exchanged, subject to the following provisions, for any form of Life or Endowment Policy, of the same face amount, written by the Company at the time of exchange. The new Policy will be issued as of the date and age specified in this Policy, and will be subject to any indebtedness to the Company on or secured by this Policy, and to any assignment on file at the Home Office of the Company. Change to a Policy with a higher premium rate will be made without evidence of insurability, upon payment of the difference between the reserves of the respective policies. Change to a Policy with a lower premium rate will be made upon evidence of insurability satisfactory to the Company, with adjustment of the difference between the cash value of this Policy and the reserve of the new Policy. Change may be made only with the consent of the Company if any premium has been waived under a disability provision, or if the new Policy shall: (a) involve any other life; or (b) increase the amount payable in event of death; or (c) include any disability or accidental death provision which is not a part of this Policy; or (d) require less than ten annual premiums payable after the date of exchange.

Assignments

No assignment of this Policy shall be binding on the Company unless in writing and until the original, or a duplicate thereof, is filed at the Home Office. Assignments shall be subject to any indebtedness to the Company on or secured by this Policy. No responsibility for the validity of assignments will be assumed by the Company.

Incontestable

This Policy shall be contestable after it has been in force for a period of two years from its date of issue, except for failure to pay premiums, and except as to any provision contained in any supplemental agreement attached hereto relating to additional benefits specifically granted in event of total and permanent disability or of death by accident.

Amended, see War and Aviation Agreement

AGE. If the age of the Insured has been misstated, the amount payable shall be that which the premium for this Policy would have purchased at the rate for the correct age.

SUICIDE. If the Insured, whether sane or insane, shall die by his or her own hand or act within two years from the date of issue of this Policy, the liability of the Company under this Policy shall be limited to the payment in one sum of the amount of premiums paid, less any indebtedness to the Company.

Contract

This Policy and the application, a copy of which is attached to and made a part of this Policy, constitute the entire contract between the parties. All statements made by the Insured or in his behalf, in the absence of fraud, shall be deemed representations and not warranties; and no such statement shall be used in defense to a claim unless contained in the application and unless a copy of such application is attached to this Policy when issued. No endorsement or alteration of this Policy and no waiver of any of its provisions shall be valid unless made in writing by the Company and signed by its President, Vice-President, Secretary, Assistant Secretary or Registrar; and no other person shall have authority to bind the Company in any manner.

Exhibit A)

Values of Policy

Loan Provisions

At any time after the first policy year, prior to maturity, while this Policy is in force except as extended insurance, on receipt of the loan agreement duly assigning the Policy, the Company will loan on the sole security of the Policy and of any additions, any amount which, with interest, shall not exceed the value of the Policy and of any additions at the end of the policy year in which such loan is made. Any existing indebtedness to the Company on or secured by this Policy and any unpaid premium for the then current policy year shall be deducted from the loan value. The Company may require delivery of the Policy at its Home Office before making such loan. The Company may defer the making of any loan, other than to pay premiums on policies in the Company, for not more than six months from date of application therefor, or for any shorter period prescribed by law.

If an automatic premium loan agreement is in effect, the amount of each premium which thereafter remains unpaid at the end of the grace period shall be charged against the Policy as a loan, provided the entire indebtedness on the Policy, with interest, shall not exceed the value of the Policy and of any additions on the next premium due date. Before the automatic premium loan provision shall be in effect, the agreement, duly assigning the Policy, must be filed with the Company at its Home Office; and the Company may require delivery of the Policy at its Home Office for endorsement. This provision shall not be applicable for settlement of less than a quarterly premium.

Loans shall bear interest at a rate equivalent to five per cent at the end of the year, payable on the dates specified in the loan agreement. Interest not paid when due shall be added to the amount of the loan and bear interest.

Loans may be repaid, in whole or in part, at any time prior to maturity, while the Policy is in force, unless meanwhile a non-forfeiture option has become operative. Failure to repay any loan or to pay interest shall terminate the insurance only when the total indebtedness equals or exceeds the loan value and thirty-one days after notice has been mailed to the last known address of the Insured.

Non-Forfeiture Provisions

The reserve on this Policy is computed by the full level premium method on the American Experience Table of Mortality and three per cent interest. The values at the end of the third and subsequent years are equivalent to the full reserve; the values for the end of the second year are equivalent to the full reserve reduced by one-half of one per cent of the face amount of the Policy.

After the Policy has been in full force for two policy years, and prior to maturity, any one of the following non-forfeiture options will be available:

EXTENDED INSURANCE. Participating term insurance, continued from the due date of the premium in default, for the face amount of the Policy and of any additions, less the amount of any indebtedness to the Company on or secured by this Policy. The term of the extended insurance shall be such as the net cash value will purchase as a net single premium. Extended insurance shall have cash values equal to the full reserve thereon, but no loan value.

PAID-UP INSURANCE. Participating paid-up insurance, payable at the same time and on the same conditions as this Policy. The amount of the paid-up Policy shall be such as the net cash value will purchase as a net single premium. Paid-up insurance shall have cash and loan values equal to the full reserve thereon, less any indebtedness.

CASH VALUE. The net cash value, which shall be the value of the Policy and of any additions and accumulated surplus, less any indebtedness to the Company on or secured by this Policy, payable on surrender of the Policy. Cash values will be available at the end of a policy year, or during a grace period, or with the consent of the Company at other times. The Company may defer payment of any cash value for not more than six months from date of application therefor, or for any shorter period prescribed by law.

ELECTION OF OPTION. Any election, in the application or in writing filed with the Company at its Home Office, in effect at the end of the grace period for the payment of the premium in default, shall determine whether the extended insurance or the paid-up insurance provision is binding. If no election is in effect, the extended insurance provision shall be binding. The extended insurance and paid-up insurance options shall not become automatically operative so long as the premium due may be paid by accumulated surplus or under the terms of an automatic premium loan agreement then in effect.

The following table shows the values at the end of certain policy years provided all premiums due during the years indicated have been paid, and provided the Policy is free from indebtedness to the Company and is without additions or accumulated surplus. If in any policy year after the second the premium for a part of a year is paid, the cash value for the end of the preceding year shall be increased by a proportionate part of the increase in the cash value for the then current year.

After Policy has been in Force for Number of Policy Years Indicated	Participating Estimated Insurance			FOR EACH \$1000 OF FACE AMOUNT			After Policy has been in Force for Number of Policy Years Indicated	Participating Estimated Insurance			FOR EACH \$1000 OF FACE AMOUNT		
	Years	Days	Participating Paid-up Insurance	Code or Loss ^a Value	Years	Days		Years	Days	Participating Paid-up Insurance	Code or Loss ^a Value		
2 Years	1	252	\$ 93	€ 72.07	14 Years	4	201	€ 370	€ 435.23				
3 "	2	171	154	114.90	15 "	4	273	599	515.47				
4 "	3	2	201	152.14	16 "	4	255	627	545.22				
5 "	3	161	246	183.71	17 "	4	223	654	574.27				
6 "	3	288	239	224.55	18 "	4	179	681	602.67				
7 "	4	27	330	259.59	19 "	4	122	706	630.55				
8 "	4	113	369	293.73	20 "	4	43	730	658.19				
9 "	4	180	406	327.13	21 "	3	333	754	695.70				
10 "	4	231	441	359.97	22 "	3	257	777	712.82				
11 "	4	267	475	391.95	23 "	3	172	799	739.03				
12 "	4	288	503	423.49	24 "	3	70	820	763.90				
13 "	4	296	539	451.50	25 "	2	323	830	787.27				

(Exhibit A)

Options of Payment

The whole or part of the proceeds payable at maturity of this Policy by death or as an endowment, or of the net cash value payable on surrender, may be made payable as hereinafter provided in accordance with one of the first five Options, or in such manner as may be mutually agreed upon with the Company. The procedure governing change of beneficiary shall apply to any election or change of election of an Option prior to maturity. Any election of an Option may not be changed after the Option becomes operative, except as provided in the election. If no election is in effect at maturity, the Payee entitled to the proceeds may then make an election for such Payee's own benefit.

FIRST OPTION. Monthly instalments certain for a definite number of years, not exceeding thirty.

SECOND OPTION. Monthly instalments based on the sex of the Payee, and on the age when this Option becomes operative. Payments shall be made only during the life of the Payee, or with a guarantee of instalments certain for ten or twenty years and thereafter during the life of the Payee, as may have been elected.

THIRD OPTION. Monthly instalments based on the sex of the Payee, and on the age when this Option becomes operative. Payments shall be made during the life of the Payee. Upon receipt of due proof of death of the Payee before the sum of the instalments paid equals the amount applied to this Option, a sum equal to the difference shall be paid.

FOURTH OPTION. Monthly interest payments at the rate of \$2.06 for each One Thousand Dollars of the amount applied to this Option, commencing one month after this Option becomes operative and continuing during the life of the Payee, or such other period as may be mutually agreed upon with the Company. This interest is the equivalent of two and one-half per cent at the end of the year. At the decease of the Payee or at the end of the period agreed upon, the amount then retained, with any accrued interest, shall be paid in one sum, unless otherwise provided.

FIFTH OPTION. Instalments of such amounts, commencing at such time and payable at such periods, as may be agreed upon with the Company, and continuing until the amount applied to this Option, with interest and dividends as hereinafter provided, is exhausted. The final instalment will be for the balance only.

SIXTH OPTION. If this Policy is surrendered at the end of the policy year when the attained age of the Insured at nearest birthday is 55, 60 or 65 years, the net cash value may be made payable in monthly instalments during the joint lifetime of the Insured and one other Payee then at least twenty-five years of age, two-thirds of such monthly income to be continued during the after lifetime of the survivor of such Payees. The monthly instalments will be based on the sex of such Payees, and on their ages when this Option becomes operative.

The first payment under the First, Second, Third or Sixth Option shall be payable when the Option becomes operative,

and each payment shall be according to the table for that Option. Quarterly, semi-annual or annual instalments may be provided at the time of election of any Option, in lieu of the monthly instalments.

The Options shall be available only with the consent of the Company, if the amount applicable thereto be less than One Thousand Dollars, or if payments under the Option are to be made to a corporation, partnership, association or fiduciary, or if the Policy is assigned other than to the Company. The Company may at its option change the period of payment to quarterly, semi-annual or annual, if necessary to bring the amount of each periodic guaranteed payment to at least Ten Dollars.

DIVIDENDS. These Options shall be credited with such shares of surplus as may be apportioned by the Company, but in the case of the Second and Third Options any such shares of surplus will be apportioned only during the certain or refund period. The Second Option without instalments certain and the Sixth Option will not participate in surplus distribution. Any shares of surplus under the First, Second, Third or Fourth Option shall be paid in instalments with the guaranteed payments. Any share of surplus under the Fifth Option shall be added each year to the unpaid balance.

FINAL PAYMENT. At the decease of any Payee after the Option elected becomes operative, the then present value of any unpaid instalments certain under the First or Second Option, commuted on the basis of interest specified for that Option, or any amount due under the provisions of the Third Option, or any principal amount and accrued interest then remaining unpaid under the Fourth or Fifth Option, shall be paid in one sum to the executors or administrators of such Payee, unless otherwise provided. The liability of the Company shall terminate with the last payment due prior to the decease of the Payee after the certain or refund period under the Second or Third Option, or of the Payee under the Second Option without instalments certain, or of the surviving Payee under the Sixth Option.

BASIS OF PAYMENTS. The reserve for the Second, Third and Sixth Options is based on the Standard Annuity Table of Mortality with interest at three per cent per annum. The Company shall pay interest at a rate equivalent to two and one-half per cent at the end of each year on any balance from time to time remaining with the Company under the First, Fourth or Fifth Option, and such unpaid balance shall constitute indebtedness of the Company. The amount of each guaranteed payment under the First, Second, Third and Fourth Options, or the amount of each periodic payment under the Fifth Option, includes such interest.

ANTICIPATION OR ALIENATION. Unless otherwise provided in the election of the Option, no Payee shall have any right to assign, alienate, anticipate or commute any instalments or payments, to make withdrawals of proceeds, or to make any change in the provisions elected; and, except as otherwise prescribed by law, no payment of interest or of principal shall be subject to the debt, contracts or engagements of any Payee, nor to any judicial process to levy upon or attach the same for the payment thereof.

The tables for the Options are printed on the following page.

hibit A)

The First Mutual Life Insurance Company Chartered in America

Part I—Application to the New England Mutual Life Insurance
For Insurance on the Life of Abe Lutz

(Please answer briefly as it should appear in the Policy)

220 W. Gardner Rd., Los Angeles, Cal. Ordinary Life with
13,000 17 to one month premium

260 State St., Los Angeles, Cal. 13,000 17 to one month premium

Harry Lutz Los Angeles U.S.A. 13,000 17 to one month premium

15 1878 M Married Don No

inter of Wittenberg & Metal No Proposed Insured Harry Lutz

self employed constr Self-employed 40,000 13,000

Reserve for HOME OFFICE USE, for ADDITIONS and AMENDMENTS

I hereby Agree that this Application, including Part II, a copy of which shall be attached to the Policy when issued, shall become a part of every Policy issued to me, that any change noted by the Company under "Additions and Amendments", and that the protection applied for shall not take effect unless and until this Application is approved by the Company at its Home Office and the first premium is paid while the Proposed Insured is in good health; provided that subsequent premiums shall be due and subsequent policy years begin as shown on the first page of the Policy. If, however, the first premium is paid with this Application, and it is so noted in answer to Question 24, the insurance shall take effect as stipulated in the Conditional Receipt.

Signed in my presence this 14 day of Nov. 1942 Allegret Proposed Insured.

Stanley F. Leeds Agent Broker Harry Lutz Applicant for Insurance.

Only your signature required if Proposed Insured and Applicant for Insurance on the same.

Part II—Application to the New England Mutual Life Insurance Company

In what countries outside the United States do you live or travel or reside? None

A Have any other rights been denied you? None

A Right to any other benefits?

B Have any rights you expect to receive in most remote countries nowhere

C Have you reached or do you intend to reach the age of 65?

D What diseases, disorders, injuries have you had since childhood? Describe fully.

HABIT OF LIFE NAME OF DISEASE DATE OF ATTACK LOCATION SYMPTOMS REMEDY

gut 1917 2 weeks wall good

hrt. & old. reverse 8/4 wife 1 year wall good

What complaint operating now What you had last year gut 1930 good

Are you now overweight or underweight? -60

In the last two years, how much has your weight increased? about

How long has your present weight been maintained? about 3 years

If any change in weight, give the reason by diet

Have you ever suffered from: A Indigestion B Diarrhea C Constipation D Overweight

E Hives F Hay fever G Shortness of breath H Pain or pressure in chest

I Arthritis J Varicose veins K Varicocele L Varicose veins in legs

M Any other condition, or having been treated by a physician or other practitioner within five years yes

N If no, give reason, name of practitioner and details under Q no

GENERAL INFORMATION GIVE THE MOST DETAILED INFORMATION POSSIBLE. IF IMPAIRED HEALTH IS INDICATED, EXPLAIN FULLY.

Parents, etc. Age Health Age Cause of Death Date How Long Ill Relationship Age Health

Father 80 good 1938 dead Father's Father 80 good

Mother 72 good 1938 dead Father's Mother 72 good

Siblings Brother 68 bad 1938 dead Mother's Father 80 good

Mo. Living 0 dead 1938 dead Mother's Mother 72 good

* Dad 6 dead 1938 dead Mother's Brother 60 good

Sisters Mo. Living 26 good 1938 dead Mother's Sister 60 good

* Dad 63 good 1938 dead Mother's Daughter 60 good

Daughters Mo. Living 60 good 1938 dead Mother's Son 60 good

Wife or Husband John H. Lutz 60 good 1938 dead

Special Information John H. Lutz - 1912 - August 1938 - Physical Examiner - Bad eyes & cataract - eye removal.

14 inches were slightly enlarged, previous 5' 1" mid-thigh - 1930 - good - weaks.

Ind. 14 - Aug 1938 In my presence

Day of November 1942

John H. Lutz - 2nd Medical Examiner.

be lawful on behalf of insurance companies and persons doing business with them, or persons engaged in any policy issued, to furnish, at premium rates, all premiums, or part thereof, or any portion of other premiums, which have accrued or accumulated, or, who may have been entitled to receive, from such persons, disclosure of any knowledge of information which he thereby requires, and I consent to any such disclosure.

Allegret Signature of Proposed Insured

DO NOT WRITE BELOW THIS LINE

(Exhibit A)

First Option—Monthly Instalments for Each \$1,000 Applied to Provide Income

Years	Instalment	Years	Instalment	Years	Instalment	Years	Instalment	Years	Instalment	Years	Instalment
		10 years	20 years			10 years	20 years			10 years	20 years
1	\$84.28	6	\$14.93	11	\$8.64	16	\$6.30	21	\$3.08	26	\$4.34
2	42.64	7	12.95	12	8.02	17	6.00	22	4.90	27	4.22
3	28.79	8	11.47	13	7.49	18	5.73	23	4.74	28	4.12
4	21.86	9	10.32	14	7.03	19	5.49	24	4.60	29	4.02
5	17.70	10	9.39	15	6.64	20	5.27	25	4.46	30	3.73

**Second and Third Options—Monthly Instalments for Each \$1,000 Applied to Provide Income
Guaranteed as long as Payee lives**

Age of Payee Married Birthday Male Female	SECOND OPTION			THIRD OPTION			Age of Payee Married Birthday Male Female	SECOND OPTION			THIRD OPTION			
	Life Annuity	Instalment 10 years	Instalment 20 years	Life Annuity	Instalment 10 years	Instalment 20 years		Life Annuity	Instalment 10 years	Instalment 20 years	Life Annuity	Instalment 10 years	Instalment 20 years	
6 11	\$2.96	\$2.95	\$2.94	\$2.92	50 55	\$3.57	\$3.56	\$3.51	\$3.46	55 60	\$5.50	\$5.28	\$4.73	\$4.82
6 12	2.97	2.96	2.95	2.93	51 56	3.61	3.60	3.54	3.49	56 61	5.43	5.39	4.79	4.71
7 12	2.99	2.98	2.96	2.94	52 57	3.66	3.64	3.58	3.53	57 62	5.51	5.41	4.84	4.80
8 13	3.00	2.99	2.98	2.95	53 58	3.70	3.68	3.62	3.56	58 63	5.53	5.43	4.86	4.80
9 14	3.02	3.01	2.99	2.97	54 59	3.75	3.73	3.66	3.60	59 64	5.59	5.49	4.90	4.84
10 15	3.03	3.02	2.99	2.97	55 60	3.80	3.78	3.70	3.64	60 65	5.66	5.55	4.96	4.90
11 16	3.05	3.04	3.03	3.00	56 61	3.85	3.83	3.74	3.68	61 66	5.64	5.51	5.05	5.01
12 17	3.06	3.05	3.04	3.02	57 62	3.91	3.88	3.79	3.72	62 67	6.63	6.14	5.10	5.52
13 18	3.08	3.07	3.06	3.04	58 63	3.97	3.93	3.83	3.77	63 68	6.83	6.28	5.14	5.64
14 19	3.10	3.09	3.08	3.06	59 64	4.02	3.99	3.87	3.81	64 69	7.05	6.42	5.19	5.76
15 20	3.12	3.11	3.10	3.07	60 65	4.09	4.05	3.92	3.86	65 70	7.27	6.57	5.23*	5.89
16 21	3.14	3.13	3.12	3.09	61 66	4.15	4.11	3.97	3.91	66 71	7.51	6.72	5.55	6.05
17 22	3.17	3.16	3.14	3.11	62 67	4.27	4.22	4.07	3.96	67 72	7.76	6.86	5.74	6.16
18 23	3.19	3.18	3.17	3.14	63 68	4.29	4.24	4.07	4.01	68 73	8.03	7.02	5.91	6.31
19 24	3.22	3.20	3.19	3.16	64 69	4.37	4.31	4.12	4.06	69 74	8.32	7.17	5.97	6.47
20 25	3.24	3.23	3.21	3.18	65 70	4.45	4.38	4.17	4.12	70 75	8.62	7.33	6.05	6.65
21 26	3.27	3.24	3.24	3.20	66 71	4.53	4.45	4.23	4.18	71 76	8.94	7.46	6.25	6.79
22 27	3.30	3.28	3.26	3.23	67 72	4.62	4.53	4.28	4.24	72 77	9.28	7.63	6.43	6.98
23 28	3.33	3.31	3.29	3.25	68 73	4.73	4.61	4.33	4.30	73 78	9.64	7.78	6.61	7.16
24 29	3.36	3.34	3.32	3.28	69 74	4.81	4.70	4.39	4.37	74 79	10.03	7.94	6.78	7.35
25 30	3.39	3.38	3.35	3.31	70 75	4.91	4.79	4.45	4.44	75 80	10.44	8.08	6.98	7.55
26 31	3.42	3.41	3.38	3.34	71 76	5.01	4.88	4.50	4.51	76 81	10.88	8.22	7.25	7.78
27 32	3.46	3.44	3.41	3.36	72 77	5.12	4.98	4.54	4.58	77 82	11.34	8.36	7.36	8.00
28 33	3.49	3.44	3.44	3.40	73 78	5.18	5.07	4.62	4.66	78 83	11.84	8.50	7.51	8.23
29 34	3.53	3.52	3.47	3.43	74 79	5.37	5.18	4.68	4.74	79 84	12.57*	8.45*	7.61*	8.51*

*This amount payable for all older ages.

Sixth Option—Monthly Instalments for Each \$1,000 Applied to Provide Income

Guaranteed while both Payees live and two-thirds of amount continued as long as Survivor lives

Age of Beneficiary Married Birthday Male Female	Age of Insured Male 55			Age of Insured Male 60			Age of Beneficiary Married Birthday Male Female	Age of Insured Male 55			Age of Insured Male 60			
	Male	Female	Female 65	Male	Female	Female 65		Male	Female	Female 65	Male	Female	Female 65	
25 30	\$3.63	\$3.74	\$3.85	\$3.97	40 45	\$4.19	\$4.36	\$4.54	\$4.73	60 65	\$5.09	\$5.42	\$5.78	\$6.17
26 31	3.65	3.76	3.87	3.99	41 46	4.23	4.41	4.59	4.78	61 66	5.14	5.48	5.86	6.27
27 32	3.67	3.78	3.90	4.02	42 47	4.27	4.45	4.64	4.84	62 67	5.19	5.54	5.93	6.36
28 33	3.69	3.81	3.92	4.05	43 48	4.31	4.49	4.69	4.89	63 68	5.24	5.61	6.01	6.44
29 34	3.72	3.83	3.95	4.08	44 49	4.35	4.54	4.74	4.95	64 69	5.30	5.67	6.09	6.56
30 35	3.74	3.86	3.98	4.11	45 50	4.39	4.59	4.80	5.01	65 70	5.35	5.74	6.17	6.65
31 36	3.76	3.88	4.01	4.14	46 51	4.45	4.63	4.85	5.08	66 71	5.40	5.80	6.25	6.76
32 37	3.79	3.91	4.04	4.17	47 52	4.47	4.68	4.91	5.14	67 72	5.45	5.87	6.35	6.86
33 38	3.82	3.94	4.07	4.21	48 53	4.52	4.73	4.97	5.21	68 73	5.51	5.93	6.42	6.96
34 39	3.84	3.97	4.10	4.24	49 54	4.54	4.79	5.03	5.28	69 74	5.54	6.00	6.50	7.07
35 40	3.87	4.00	4.14	4.28	50 55	4.60	4.84	5.09	5.35	70 75	5.61	6.06	6.58	7.17
36 41	3.90	4.03	4.17	4.32	51 56	4.65	4.89	5.13	5.42	71 76	5.67	6.13	6.64	7.28
37 42	3.93	4.06	4.21	4.35	52 57	4.70	4.95	5.21	5.50	72 77	5.72	6.19	6.75	7.38
38 43	3.96	4.10	4.24	4.40	53 58	4.74	5.00	5.28	5.57	73 78	5.77	6.26	6.83	7.49
39 44	3.99	4.13	4.28	4.44	54 59	4.79	5.06	5.35	5.65	74 79	5.83	6.32	6.91	7.60
40 45	4.02	4.17	4.32	4.48	55 60	4.84	5.12	5.42	5.73	75 80	5.88	6.39	7.00	7.70
41 46	4.05	4.21	4.36	4.53	56 61	4.89	5.17	5.49	5.82	76 81	5.93	6.45	7.08	7.81
42 47	4.09	4.24	4.41	4.57	57 62	4.94	5.23	5.56	5.90	77 82	5.98	6.52	7.16	7.92
43 48	4.12	4.28	4.45	4.62	58 63	4.99	5.28	5.63	5.99	78 83	6.03	6.58	7.24	8.02
44 49	4.16	4.32	4.50	4.67	59 64	5.04	5.35	5.71	6.08	79 84	6.08*	6.64*	7.32*	8.19*

*This amount payable for all older ages.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Comes now New England Mutual Life Insurance Company of Boston, a corporation, plaintiff above named, and answers the counterclaim of defendant Harry Lutz and admits, denies and alleges as follows:

I.

Plaintiff admits the allegations of paragraphs I, II, III, V and VIII of said alleged counterclaim.

II.

Answering the allegations of paragraph IV of said alleged counterclaim, plaintiff admits that in consideration of the payment of the premiums provided for in the policy involved in the within entitled action, plaintiff issued its policy of insurance, number 1172 844, in writing upon the life of Abe Lutz in the face [45] amount of \$13,000, and that said original policy is in the possession of plaintiff and that Exhibit "A", attached to the answer and counterclaim of defendants herein, is a photostatic copy of said original policy, which said policy sets forth the obligations of the plaintiff and the parties hereto. Except as herein expressly admitted, plaintiff denies each, all and every allegation contained in said paragraph IV and the whole thereof.

III.

Answering the allegations of paragraphs VI, VII, and IX of said alleged counterclaim, plaintiff denies each, all and every allegation therein contained and the whole thereof except that plaintiff admits that the sum of \$13,000, nor any part thereof, has not been paid.

And as a Further, Separate and First Affirmative Defense, Plaintiff Alleges:

I.

Plaintiff here refers to the amended complaint for rescission and cancellation of the policy involved in the within entitled action and for declaratory relief, on file in the within entitled action, and by this reference makes the same a part of this affirmative defense with the same force and effect as though the allegations of said amended complaint were set forth herein in full.

Wherefore, plaintiff prays that said Harry Lutz take nothing by his counterclaim; that judgment be rendered in favor of plaintiff and against defendants, as set forth in the prayer of the amended complaint for rescission and cancellation of the policy involved herein and by this reference incorporates the prayer of said amended complaint as a part of the prayer of this answer, with the same force and effect as though the said prayer were set forth herein in full.

MESERVE, MUMPER & HUGHES
By Leo E. Anderson

Attorneys for Plaintiff, New England Mutual Life
Insurance Company of Boston. [46]

[Verified.]

[Endorsed]: Feb. 16, 1945. [47]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on the 23rd day of March, 1945, before the Honorable Ralph E. Jenney, Judge, presiding without a jury, trial by jury having been expressly waived by all parties to said action. Plaintiff appeared by its attorneys, Meserve, Mumper & Hughes by Roy L. Herndon and Leo E. Anderson, and defendants appeared by their attorneys, McLaughlin & McGinley by John P. McGinley and William L. Baugh. Evidence both oral and documentary having been introduced, and the cause having been submitted to the court for decision upon the record and upon briefs theretofore filed, the court now finds the facts to be as follows:

FINDINGS OF FACT

I.

That plaintiff, New England Mutual Life Insurance Company of Boston, is, and at all times herein mentioned has been, a corpor- [48] ation duly organized and existing under and by virtue of the laws of the State of Massachusetts with its principal office and place of business in the City of Boston, State of Massachusetts, and a citizen of the State of Massachusetts.

II.

That this action involves an amount, exclusive of interest and costs, in excess of \$3,000.00.

III.

That defendants, Harry Lutz and Rose Lutz, are the duly appointed, qualified and acting executor and exe-

cutrix of the last will and testament of Abe Lutz, deceased, having been duly appointed by the court having jurisdiction of the probate of the estate of said decedent. That each of the defendants herein is a resident and citizen of the State of California and resides within the territorial limits of the Southern District of California.

IV.

That on or about the 14th day of November, 1942, said Abe Lutz, now deceased, as proposed insured, and Harry Lutz, defendant herein, as applicant for insurance, made application to plaintiff company for the issuance of a policy of ordinary life insurance in the amount of \$13,000.00 upon the life of said Abe Lutz; that said application was in writing and was signed by said Abe Lutz and by defendant Harry Lutz.

V.

That on or about the 16th day of November, 1942, in connection with, and as a part of, said application for insurance, and for the purpose of inducing plaintiff company to issue a policy of insurance on his life, said Abe Lutz presented himself to the medical examiner of plaintiff company for medical examination, and was then examined by said medical examiner and, in connection with such examination, made certain answers to questions contained in said application, which questions were propounded by said examiner; that the [49] answers given by said Abe Lutz to said questions were accurately recorded in writing as a part of said application for said policy of insurance; that said Abe Lutz thereafter read and signed said application and certified that his answers to the questions therein contained were true, complete and correctly recorded therein. That said application for

insurance was delivered to plaintiff company by defendant Harry Lutz.

VI.

That thereafter, and on or about December 1, 1942, plaintiff company issued its policy of life insurance number 1 172 844 in the face amount of \$13,000.00 upon the life of said Abe Lutz. That said policy of insurance was delivered to defendant Harry Lutz at Los Angeles, California, on or about December 9, 1942, and defendant Harry Lutz did then and there pay the first premium upon said policy. That at the time of the issuance and delivery of said policy as aforesaid, a true and correct photostatic copy of said application therefor, including the answers made by the insured to the medical examiner as aforesaid, was attached to, and made a part of, said policy.

VII.

That by the terms of said policy of life insurance issued by plaintiff company as aforesaid, it was provided, among other things, that upon receipt of due proof of the death of said Abe Lutz, the insured, plaintiff company would pay to Harry Lutz, son of the insured, or, if deceased, the executors, administrators or assigns of said son, the sole owner of said policy, the sum of \$13,000.00.

VIII.

That said Abe Lutz, the insured named in said policy of life insurance, died in the City of Los Angeles, County of Los Angeles, State of California, on or about the 28th day of May, 1944; that defendant Harry Lutz, the beneficiary named in said policy, [50] then was, and now is, alive.

IX.

That in and by said application for said policy of insurance, said Abe Lutz, insured, represented to plaintiff company that said Abe Lutz had never suffered from indigestion, dizziness, or fainting spells, palpitation of the heart or pain or pressure in the chest. That said representations were false and were known by said insured to be false at the time said application was made and signed; that prior to the time that said application for insurance was made and signed, said insured had suffered from indigestion, dizziness and fainting spells and from pain in the chest.

X.

That in and by said application for insurance, the insured was asked whether he had consulted or been examined by a physician or other practitioner within five years prior to the date thereof, and, if so, to give reasons, name of practitioner and details with reference thereto. That in response to said questions, the insured disclosed no information except that he had consulted Dr. Maurice H. Rosenfeld in August, 1942, and was given at that time a physical examination and blood sugar determination; and insured represented that the report of said examination was normal.

XI.

That, within five years prior to the date of said application, said insured had consulted, and had been examined by, physicians at times other than in August, 1942; that within five years prior to the date of said application for insurance, said insured had consulted and been treated by physicians for dizziness and fainting spells and for pain in the chest. That during the year

1942 and prior to the date of the application for said insurance, said insured, on numerous occasions had consulted and been examined by a physician and had received treatments for angina pectoris, a disease of the heart. That during the year 1942 and prior to the [51] date of the application for said policy of insurance, said insured had submitted to repeated physical examinations which included the taking of electrocardiograms and had been told by his physician that he was suffering from a heart ailment, to-wit, angina pectoris, and that he should curtail and limit his activities by reason thereof; that during the year 1942 and prior to the date of the application for said policy of insurance, said insured's physician had prescribed medicine to relieve pain in the chest suffered by insured as a result of said heart ailment. That all of the facts in this paragraph recited were concealed, and none of them was disclosed, in the application for said policy of insurance.

XII.

That all of the facts concerning the health and medical history of said insured which were misrepresented and concealed in the application for said policy of insurance, as herein found, were known to the insured at the time said application was made and signed, and said facts were material to the risk insured against under the terms of said policy.

XIII.

That plaintiff company, in issuing said policy number 1 172 844 upon the life of said Abe Lutz, relied upon the facts as disclosed and represented in the application for said policy; that plaintiff company would not have issued said policy of life insurance if, at the time said policy was issued, plaintiff had known the facts concerning the

health and medical history of the insured which were concealed and misrepresented in and by said application, as hereinabove set forth.

XIV.

That said policy of insurance, subsequent to its delivery to defendant Harry Lutz as aforesaid, was placed in a safe deposit box to which both the insured and defendant Harry Lutz had access; that both said insured and said Harry Lutz had knowledge of the [52] terms and provisions of said policy from and after the date of its delivery.

XV.

That subsequent to the death of said Abe Lutz, plaintiff company, for the first time, received information causing it to believe that the statements and answers contained in said application for insurance were not true, and, by reason thereof, plaintiff thereafter caused an investigation to be made, and, as a result of said investigation, plaintiff first learned the true facts concerning the matters misrepresented and concealed in said application for insurance, as hereinabove set forth. That prior to the death of said insured, plaintiff company had no knowledge, information or notice that any material fact concerning the health or medical history of said insured was misrepresented or concealed in said application.

XVI.

That promptly after discovering that material facts concerning the health and medical history of said insured had been misrepresented and concealed in said application, plaintiff company gave notice in writing to defendant Harry Lutz that it had elected to, and did thereby, rescind said policy of life insurance. The at the time of giving

its said notice of rescission, plaintiff company duly tendered to defendant Harry Lutz the sum of \$2,523.43. That said amount so tendered to defendant Harry Lutz constituted and represented all of the premiums and considerations received by plaintiff company for, or on account of, the issuance of said policy of insurance, together with interest thereon from the date of receipt thereof by plaintiff to the date of said tender. That defendant Harry Lutz rejected and declined to accept said tender. That at the time of making said tender, plaintiff company was, and ever since has been, ready, willing and able to restore to defendant Harry Lutz all premiums paid and considerations given by said defendant and [53] received by plaintiff company in consideration of the issuance of said policy of insurance.

XVII.

That in and by said policy of insurance, it was provided that said policy should be incontestable after two years from the date of issuance thereof, except for non-payment of premiums. That at the time of the commencement of this action, a period of two years had not elapsed since the date of the issuance of said policy, but that said two-year period was then about to elapse. That after the expiration of said two years from the date of issuance of said policy of insurance, plaintiff company would have been prevented, by reason of said incontestable clause, from contesting said policy or from relieving itself from liability thereunder by reason of misrepresentation and concealment in the procurement thereof. That no action to recover upon said policy had been instituted by defendants, or either or any of them. That it was therefore necessary for plaintiff to commence this action to rescind and cancel said policy in order

to save its rights to contest the validity of said policy, which rights otherwise would have been lost upon the expiration of said period of two years.

XVIII.

That plaintiff company has no adequate remedy at law, and that if said policy were left outstanding, it would, or might be, the source of irreparable injury to plaintiff.

XIX.

That it was, and is, provided by the terms of said policy of life insurance and of the application therefor that said policy should not take effect unless and until said application should be approved by plaintiff at its home office and the first premium paid while the said insured was in good health. That said insured was not in good health at the time said policy was delivered, or at the time the first premium thereon was paid. That said insured knew, [54] at the time said application for insurance was signed and delivered and at the time said policy was issued and delivered, and at the time the first premium thereon was paid, that he was not in good health, but that he was suffering from a serious disease of the heart, to-wit, angina pectoris.

XX.

That all of the premiums paid on said policy of insurance were paid by defendant Harry Lutz, individually. That defendants Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, deceased, have disclaimed any and all right, title or interest in or to said policy, any proceeds thereof and any moneys required to be restored by plaintiff upon rescission thereof; that the estate of said decedent,

Abe Lutz, has no right, title or interest in or to said policy or any proceeds thereof, or any moneys required to be paid or restored by plaintiff upon the cancellation and rescission of said policy.

XXI.

That at the time said application for said policy was signed by said insured, said insured knew the contents thereof and knew that the answers to the questions therein contained concerning his health and medical history were not true and complete, and knew that matters of fact, concerning his health and medical history and material to the risk to be insured against by the policy therein applied for, were concealed and misrepresented in and by said application. That it is not true that said insured truly and correctly answered all questions asked him by the medical examiner and by the agent who filled in the application for said policy.

XXII.

That it is not true that said insured furnished the agents and representatives of plaintiff with full, true and correct information on all matters as to which information was requested by said agents and representatives, but that said insured did misrepresent [55] and conceal matters of fact concerning which he was interrogated.

XXIII.

That it is true that prior to the time said policy was issued by plaintiff, the insured was examined by plaintiff's medical examiner, and that said medical examiner made a report to plaintiff concerning said examination. It is true that plaintiff's representatives contacted the office of the physician of said insured, but it is not true that they obtained, or that plaintiff had the opportunity of

obtaining, full, true or correct information from such physician regarding the physical condition and health of said insured. That it is not true that plaintiff knew that other insurance policies were cancelled by defendant Harry Lutz, or that the insurance policy herein described was obtained in lieu and in place of other insurance policies on the life of said Abe Lutz. That it is not true that plaintiff had ample opportunity to ascertain the true facts concerning the health and medical history of said insured prior to the death of said insured. That it is not true that plaintiff is estopped to rescind or cancel said policy or to refuse payment of the proceeds thereof; that it is not true that plaintiff is precluded from relief by reason of any delay in rescinding said policy; that it is true that plaintiff rescinded said policy promptly upon discovery of facts entitling it to rescind.

XXIV.

That it is true that a representative of plaintiff contacted the office of a physician of Abe Lutz, but it is not true that plaintiff obtained, or had the opportunity of obtaining, any information from such physician regarding the physical condition or health of said Abe Lutz; that it is not true that at the time of the making and signing of the application for said policy, the said Abe Lutz informed plaintiff's medical examiner and agent that Dr. Maurice H. Rosenfeld of Los Angeles, California, was his family and attending [56] physician and had given him a complete physical examination, including, but not limited to, blood sugar tests; that it is true that insured disclosed to the medical examiner that he had submitted to a physical examination and blood sugar determination by Dr. Maurice H. Rosenfeld in August, 1942, and stated that the report of said examination was normal. That it

is not true that plaintiff's medical examiner, in examining said insured, made tests of all matters concerning which plaintiff was misled by the misrepresentations and concealments in the application for said policy. That it is true that prior to insured's death plaintiff made no investigation to determine the truthfulness or completeness of the answers and information contained in the application for said policy; that it is true that plaintiff relied upon the truthfulness and completeness of the answers made and contained in said application. That it is not true that plaintiff has waived all or any of the matters, facts and things concerning which it was misled and concerning which information was concealed and misrepresented in the application for said policy.

XXV.

That all premiums and considerations paid to plaintiff in consideration of the issuance of said policy were paid by defendant Harry Lutz; that the total amount of the premiums and considerations so paid by defendant Harry Lutz, with interest thereon at the legal rate from the date of payment thereof to October 10, 1944, the date on which plaintiff tendered to defendant Harry Lutz the return thereof, is the sum of \$2,523.43; that on October 10, 1944, plaintiff made a good, sufficient and legal tender of said sum to defendant Harry Lutz.

XXVI.

That except as the facts are otherwise expressly found herein, all of the allegations of plaintiff's amended complaint herein are true, and all of the allegations of defendants' answer and of the [57] counterclaim of defendant Harry Lutz are untrue, except as the same have been found herein to be true.

And, from the foregoing facts, the court draws its conclusions of law as follows:

CONCLUSIONS OF LAW

I.

That plaintiff, New England Mutual Life Insurance Company of Boston, a corporation, is entitled to judgment cancelling and rescinding said policy of insurance, declaring said policy void and requiring that the original of said policy be delivered into the possession of plaintiff company for cancellation.

II.

That plaintiff is entitled to judgment declaring that defendants herein have no rights and that plaintiff has no duties, liabilities or obligations under or by virtue of said policy of life insurance, except that defendant Harry Lutz is entitled to receive, and that plaintiff is obligated to pay to said defendant Harry Lutz, the sum of \$2,523.43, said sum to constitute a full restoration by plaintiff company of all premiums and considerations received by it under or by virtue of said policy of insurance.

III.

That said policy of insurance failed to become effective by reason of the fact that the insured therein named was not in good health, and knew that he was not in good health, when the application for said policy was approved by plaintiff, when the first premium on said policy was paid, and when said policy was delivered.

IV.

That by reason of misrepresentation and concealment of facts, known to the insured and material to the risk, which facts said insured ought to have communicated and disclosed in said application, plaintiff did promptly rescind, and was entitled to rescind, said policy of insurance. [58]

V.

That plaintiff has not waived, and is no estopped to assert, its right to rescind said policy of insurance.

VI.

That none of the matters or causes of action set forth in plaintiff's amended complaint herein is barred by the provision of said policy by which said policy is declared to be incontestable after it has been in force for a period of two years from the date of its issue.

VII.

That plaintiff is entitled to judgment herein declaring that defendant Harry Lutz shall take nothing by this action or by his counter-claim filed herein.

Now, Therefore, Let Judgment Be Entered Accordingly.

Dated: This 13th day of June, 1945.

RALPH E. JENNEY
Judge.

[Endorsed]: Filed Jun. 14, 1945. [59]

In the District Court of the United States
Southern District of California
Central Division

Civil No. 3930—R. J.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY OF BOSTON, a corporation.

Plaintiff,

vs.

HARRY LUTZ and HARRY LUTZ and ROSE
LUTZ, as executor and executrix of the last will and
testament of Abe Lutz, Deceased,

Defendants.

JUDGMENT

The above entitled action came on regularly for trial on the 23rd day of March, 1945, before the Honorable Ralph E. Jenney, Judge, presiding without a jury, trial by jury having been expressly waived by all parties to said action. Plaintiff appeared by its attorneys, Meserve, Mumper & Hughes, by Roy L. Herndon and Leo E. Anderson, and defendants appeared by their attorneys, McLaughlin & McGinley, by John P. McGinley and William L. Baugh. Evidence both oral and documentary having been introduced, and the cause having been submitted to the court for decision upon the record and upon briefs theretofore filed, and the court having found the facts specially and stated separately its conclusions of law thereon and having directed the entry of judgment accordingly in favor of plaintiff, [60]

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as Follows:

(1) That policy of life insurance numbered 1 172 844, issued by New England Mutual Life Insurance Company of Boston, a corporation, on the life of Abe Lutz, in the

face amount of \$13,000.00 and naming defendant, Harry Lutz son of the insured, as beneficiary thereunder, be, and it is hereby, rescinded and cancelled.

(2) That the original of said policy of life insurance shall be surrendered and delivered to plaintiff, New England Mutual Life Insurance Company of Boston, for cancellation.

(3) That defendants herein have no rights, and plaintiff company has no duties, liabilities or obligations, under or by virtue of said policy of life insurance, except that defendant Harry Lutz is entitled to receive, and that plaintiff is obligated to pay to said Harry Lutz, the sum of \$2,523.43, said sum to constitute a full and complete restoration by plaintiff company of all premiums and considerations received by it under or by virtue of said policy.

(4) That except as hereinabove expressly provided, defendant Harry Lutz shall take nothing by this action or by his counter-claim herein.

(5) That plaintiff have and recover from defendant Harry Lutz its costs, which shall include the amounts paid by plaintiff to the official stenographic reporters for their services in reporting, and for the original copies of those transcripts of the testimony and proceedings upon the trial which were furnished to the court; plaintiff's said costs are hereby taxed and allowed in the sum of \$248.05.

Dated: This 13th day of June, 1945.

RALPH E. JENNEY

Judge

Judgment entered Jun. 14, 1945. Docketed Jun. 14, 1945. Book 33, page 359. Edmund L. Smith, Clerk; by P. D. Hooser, Deputy.

[Endorsed]: Filed Jun. 14, 1945. [61]

[Title of District Court and Cause.]

STIPULATION FOR PAYMENT AND ACCEPTANCE OF MONEYS WITHOUT PREJUDICE TO RIGHTS OF EITHER PARTY ON APPEAL

Whereas on or about the 14th day of June, 1945, the Judgment was signed and entered in the above entitled action, which provided, among other things, that the defendants Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, were entitled to receive, and that plaintiff was obligated to pay said defendants the sum of Two Thousand Five Hundred Twenty-three Dollars and Forty-three Cents (\$2,523.43), as a full and complete restoration by plaintiff of all premiums and considerations received by it under and by virtue of the life insurance policy involved in the said action; and

Whereas defendants Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, intend to appeal from the said judgment, and plaintiff [62] is desirous of refunding such moneys less costs due plaintiff before the outcome or final determination of said action on appeal;

Now Therefore, It Is Hereby Stipulated by and between plaintiff and defendants Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, as follows:

1. That plaintiff may pay to Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the

Last Will and Testament of Abe Lutz, Deceased, and said defendants may receive the said sum of \$2,275.38, which represents the \$2,523.43 after deducting the plaintiff's costs taxed by the trial court in the above entitled matter in the sum of \$248.05, and that said sum may be paid and accepted without prejudice to the right of defendants Harry Lutz and Harry Lutz and Rose Lutz as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, to appeal from the judgment in the above entitled action, and to urge on said appeal as grounds for reversal and as error each and every ground and error which defendants might have urged if the said payment had not been made.

2. In the event that the judgment is affirmed, or the appeal otherwise disposed of adversely to said defendants, defendants agree to execute and deliver to plaintiff a full satisfaction of the judgment.

3. In the event that it should be finally determined in this action that defendants are entitled to the relief or recovery, or any part of the relief or recovery which defendants sought hereunder, then and in such event the moneys paid hereunder shall be credited toward any larger sum which might be adjudged or decreed to be due and owing from plaintiff to defendants, and such judgment shall be partially satisfied by the amount of the payment made herein as hereinabove specified.

4. This stipulation shall in no way prejudice the con- [63] tentions which either party might otherwise

be entitled to urge in connection with said appeal, nor shall it be deemed as an admission against either party in connection with any matter urged on such appeal.

Dated: July 16, 1945.

MESERVE, MUMPER & HUGHES

By Roy L. Herndon

Attorneys for Plaintiff

McLAUGHLIN & McGINLEY

By John P. McGinley

Attorneys for Defendants

[Endorsed]: Filed Jul. 23, 1945. [64]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT
OF APPEALS UNDER RULE 73(B).

Notice Is Hereby Given that Harry Lutz and Harry Lutz and Rose Lutz, as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 14, 1945, in Civil Order Book No. 33, page 359, and particularly from paragraphs (1), (2), (3) and (4) thereof, reading as follows:

"(1) That policy of life insurance numbered 1 172 844, issued by New England Mutual Life Insurance Company of Boston, a corporation, on the life of Abe Lutz, in the face amount of \$13,000.00 and naming defendant, Harry Lutz, son of the insured, as beneficiary thereunder, be, and it is hereby, rescinded and cancelled. [65]

"(2) That the original of said policy of life insurance shall be surrendered and delivered to plaintiff, New England Mutual Life Insurance Company of Boston, for cancellation.

"(3) That defendants herein have no rights, and plaintiff company has no duties, liabilities or obligations, under or by virtue of said policy of life insurance, except that defendant Harry Lutz is entitled to receive, and that plaintiff is obligated to pay to said Harry Lutz, the sum of \$2,523.43, said sum to constitute a full and complete restoration by plaintiff company of all premiums and considerations received by it under or by virtue of said policy.

"(4) That except as hereinabove expressly provided, defendant Harry Lutz shall take nothing by this action or by his counter-claim herein."

Dated: August 10, 1945.

McLAUGHLIN & McGINLEY
JOHN P. McGINLEY
W. L. BAUGH

Attorneys for Appellants Harry Lutz and
Harry Lutz and Rose Lutz as Executor
and Executrix of the Last Will and
Testament of Abe Lutz, Deceased

Address: 1224 Bank of America Bldg.
650 South Spring Street
Los Angeles 14, California

[Endorsed]: Filed & mailed copy to Meserve, Mumper
& Hughes, Roy L. Herndon, Leo Anderson, attys. for
plf. Aug. 28, 1945. [66]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that Fidelity and Deposit Company of Maryland, a corporation, organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto New England Mutual Life Insurance Company of Boston, a corporation, plaintiff in the above entitled case, in the penal sum of Two Hundred Fifty Dollars (\$250) to be paid to said plaintiff, its successors, assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The condition of the above obligation is such, That Whereas defendant and appellants, Harry Lutz and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament [67] of Abe Lutz, deceased, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court of the United States, Southern District of California, Central Division, made and entered on June 14, 1945, in Civil Order Book No. 33, page 359, in favor of New England Mutual Life Insurance Company of Boston, a corporation, in the above entitled case.

Now, Therefore, if the above named appellants shall answer all costs which may be adjudged against them if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety,

the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 13th day of August, 1945.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By D. M. Ladd

Attorney-in-fact

Attest Robert Hecht

Agent [68]

State of California

County of Los Angeles—ss.

On this 13th day of August, 1945, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared D. M. Ladd, known to me to be the attorney in fact, and Robert Hecht, known to me to be the agent of Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto, and their own names as attorney in fact and agent respectively.

(Seal)

S. M. SMITH

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires Feb. 18, 1946.

Examined and recommended for approval as provided
in Rule 8.

JOHN P. McGINLEY

Attorney.

The premium charged for this bond is \$10.00 *Dollars*
per annum.

[Endorsed]: Filed Aug. 28, 1945. [69]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON APPEAL
UNDER RULE 19(6)

Notice Is Hereby Given that at the hearing of this appeal, appellants will rely upon the following points:

Point I.

The trial court erred in denying defendants' motion for dismissal at close of plaintiff's case. This error resulted primarily from (a) failure properly to apply the law of contracts which prevents a party from claiming and enjoying the benefits of a contract at the same time while urging the contract to have been void from its inception. The plaintiff had denied liability under the policy of insurance in suit, yet was permitted to claim the benefits of a waiver of confidential communications signed by insured on the application which was made a part of the policy by incorporation; and (b) failure to decree that plaintiff had [74] waived and was estopped to claim that material information had been withheld from it relative to insured's physical condition and medical history.

Point II.

The trial court erred in admitting, over objection of the defendants, testimony of insured's attending physician disclosing information relating to the health and physical condition of the insured during his lifetime. Such information was acquired from insured to enable said attending physician to prescribe treatment. This error was contributed to by the court's failure to rule that (a) a phy-

sician may not, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient; (b) plaintiff insurance company was prohibited and estopped from claiming and enjoying the benefits of the waiver which, by the terms of the policy, was expressly made a part of the contract, when it affirmatively appeared by the pleadings and proof that plaintiff insurance company denied all liability under said policy and claimed that said contract was void from its inception; and (c) certain limited and special waivers signed by the beneficiary under the policy, after the insured's death, did not constitute general waivers of privileged communications relating to the insured's health and medical history.

Point III.

The trial court erred in decreeing rescission and cancellation of the policy in suit for fraud of insured in allegedly concealing and misrepresenting material facts relative to the insured's health and medical history. This error resulted from a failure properly to apply the law of waiver and estoppel against plaintiff insurance company under the special facts shown by the evidence.

Point IV.

The trial court erred in failing to decree that plaintiff [75] had waived the alleged fraud complained of. This error resulted from an improper interpretation and application of the law relating to the defense of

waiver in view of the evidence showing that (a) plaintiff insurance company had placed at its disposal, prior to the issuance of the policy in suit, the exact source from which it could have obtained the information upon which the court decreed rescission and cancellation; (b) plaintiff insurance company was furnished with a waiver of confidential communications, the name of insured's attending physician, the fact of a physical examination shortly prior to the date of the application, yet made no investigation or an incomplete investigation, promptly issued its policy and accepted without protest two annual premiums; and (c) plaintiff insurance company remained silent during the lifetime of insured, and following the death of insured and filing of notice of claim and proof of death, for the first time, by investigation disclosed facts concerning insured's health and medical history, which could have been ascertained by it prior to the issuance of the policy, or, in any event, during the lifetime of insured, by contacting insured's attending physician.

Point V.

The trial court erred in failing to find that plaintiff was estopped from asserting the alleged fraud complained of. The error resulted from an improper interpretation and application of the law relating to the defense of estoppel under the circumstances set forth under Point IV. Additionally, (a) the defendant Harry Lutz had caused to be cancelled, to his prejudice, other insurance policies on the life of the insured, in the belief that the policy in suit was valid; and (b) no attempt was made by plaintiff

insurance company to cancel or rescind the policy in suit until after the death of the insured and subsequent to the time defendant Harry Lutz had materially changed his position [76] by accepting lesser benefits from paid-up policies on the life of insured.

Dated: September 7, 1945.

McLAUGHLIN & McGINLEY
JOHN P. McGINLEY
W. L. BAUGH

Attorneys for Appellants Harry Lutz and
Harry Lutz and Rose Lutz as Executor
and Executrix of the Last Will and
Testament of Abe Lutz, Deceased.

Address: 1224 Bank of America Building
650 South Spring Street
Los Angeles 14, California

Received copy of the within document this 7th day of
Sept. 1945. Meserve, Mumper & Hughes, by Berta Dietrich,
Attorneys.

[Endorsed]: Filed Sep. 7, 1945. [77]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties to the above entitled cause, through their respective attorneys, that the time for filing the record on appeal herein and docketing this appeal may and shall be extended to and including November 6, 1945.

This stipulation is a part of the record on appeal.

Dated: October 22, 1945.

McLAUGHLIN & McGINLEY
JOHN P. McGINLEY
W. L. BAUGH

Attorneys for Defendants-Appellants [86]

MESERVE, MUMPER & HUGHES
By Roy L. Herndon
Attorneys for Plaintiff-Appellee

It Is So Ordered.

H. A. HOLLZER
United States District Judge

Dated: October 23, 1945.

[Endorsed]: Filed Oct. 23, 1945. [87]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties to the above entitled cause, through their respective counsel, that the time for filing the record on appeal herein and docketing this appeal may and shall be extended to and including November 16, 1945.

This stipulation is a part of the record on appeal.

Dated: October 31, 1945.

McLAUGHLIN & McGINLEY

JOHN P. McGINLEY

W. L. BAUGH

Attorneys for Defendants-Appellants [90]

NESERVE, MUMPER & HUGHES

By Roy L. Herndon

Attorneys for Plaintiff-Appellee

It Is So Ordered

PAUL J. McCORMICK

United States District Judge

Dated: Nov. 2, 1945.

[Endorsed]: Filed Nov. 2, 1945. [91]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMISSION OF RECORDS, PROCEEDINGS AND EVIDENCE

It Is Hereby Stipulated by and between the parties to the above entitled cause, through their respective attorneys, that the Clerk of this Court, in conformance with Rule 75 of the Rules of Civil Procedure, shall transmit to the Clerk of the Circuit Court of Appeals of the United States, in and for the Ninth Circuit, the portions of the record, proceedings and evidence in this case designated by appellants on October 30, 1945, certifying those portions which are necessary to be certified in pursuance of said rule, or pursuant to the rules of said Circuit Court of Appeals; the original reporter's transcript and the original exhibits forwarded pursuant to Rule 75(i) to be held by the Clerk of the Circuit Court of Appeals pending said appeal and thereafter returned to [88] this Court.

This stipulation is a part of the record on appeal.

Dated: October 30, 1945.

McLAUGHLIN & McGINLEY

JOHN P. McGINLEY

W. L. BAUGH

Attorneys for Defendants-Appellants

MESERVE, MUMPER & HUGHES

By Roy L. Herndon

Attorneys for Plaintiff-Appellee

It Is So Ordered.

PAUL J. McCORMICK

United States District Judge

Dated: Oct. 31, 1945.

[Endorsed]: Filed Oct. 31, 1945. [89]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages numbered from 1 to 91 inclusive contain full, true and correct copies of Amended Complaint for Rescission and Cancellation of Life Insurance Policy and for Declaratory Relief; Answer of Harry Lutz and Harry Lutz and Rose Lutz, as Executor and Executrix of the Last Will and Testament of Abe Lutz, Deceased, to Amended Complaint of Plaintiff, and Counterclaim of Harry Lutz; Answer to Counterclaim; Findings of Fact and Conclusions of Law; Judgment; Stipulation for Payment and Acceptance of Moneys Without Prejudice to Rights of Either Party on Appeal; Notice of Appeal; Undertaking for Costs on Appeal; Designation of Portions of Record on Appeal; Statement of Points on Appeal; Designation by Appellee of Additional Portions of Record; Objections of Defendants to Designation by Appellee of Additional Portions of Record; Appellee's Reply to Objections of Appellants to Appellee's Designation of Additional Portions of Record; Stipulations and Orders Extending Time to Docket Appeal and Stipulation and Order for Transmission of Records, etc.; which, together with Original Plaintiff's Exhibits Nos. 1, 2, 4, 5, 6, 7, 9, 10, 11, 20, 27 and 29 and Original Defendants' Exhibits Nos. C, D, and P and five volumes of Original Reporter's Transcripts, trans-

mitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$16.45 which sum has been paid to me by appellants:

Witness my hand and the seal of said District Court this 10 day of November, 1945.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause.]

Hon. Ralph E. Jenney, Judge Presiding

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL

Aparances:

Messrs. Meserve, Mumper & Hughes, by Roy L. Herndon, Esq., and Leo Anderson, Esq., for Plaintiff.

Messrs. McLaughlin & McGinley, by John P. McGinley, Esq., and W. L. Baugh, Esq., for Defendants.

Los Angeles, California, Friday, March 23, 1945;
10 a. m.

Mr. Herndon: May it please your Honor, plaintiff will offer as its first exhibit the pre-trial stipulation. I assume that it will not be necessary to read that stipulation into evidence.

The Court: No, I have already read it. That is the statement: Re pre-trial conference?

Mr. Herndon: Yes, your Honor, it embraces the stipulation as to certain facts.

The Court: That is the one filed March 12, 1945?

Mr. Herndon: Yes, your Honor.

The Court: That may be received in evidence and marked Plaintiff's Exhibit No. 1.

Mr. Herndon: I have heretofore shown to counsel, and now offer in evidence as plaintiff's exhibit next in order, the original application for policy in suit which consists of two parts headed: Part 1, application to New England Mutual Life Insurance Company; Part 2, application to New England Life Insurance Company and attached to application as part of the same document are the agent's certificate and report of the medical examiner.

The Court: You wish those to be one exhibit?

Mr. Herndon: Yes, your Honor.

The Court: Will the clerk please fasten these together?

Mr. Herndon: I have the original here, your Honor, of [2*] which this is a certified copy.

The Court: Very well. Have you got them all together? Is that one document?

Mr. Herndon: Yes; they are all an integral part.

The Court: That will be Plaintiff's Exhibit No. 2.

Mr. Herndon: As plaintiff's next exhibit in order we offer the original policy bearing No. 1172844.

The Court: That is what document?

Mr. Herndon: The original policy of insurance.

The Court: That may be received and marked Plaintiff's Exhibit No. 3.

Mr. Herndon: As plaintiff's exhibit next in order we offer notice of claim and proof of death on the form of New England Mutual Life Insurance Company of Boston, Massachusetts.

The Court: It may be received and marked next in order.

The Clerk: No. 4.

Mr. Herndon: At this time, if the court please, I would like to call as plaintiff's first witness Mr. H. C. Ludden. [3]

*Page numbering appearing at top of page of original Reporter's Transcript.

H. C. LUDDEN,

a witness called by and on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: How do you spell your last name?

The Witness: L-u-d-d-e-n.

Direct Examination

Q. By Mr. Herndon: Where do you reside, Mr. Ludden? A. 6712 Leland Way, Hollywood.

Q. What is your business or occupation?

A. Pharmacist.

Q. How long have you been engaged in that profession? A. About 30 years.

Q. Are you licensed in the State of California?

A. I am.

Q. Where do you follow this profession?

A. 301 South Western Avenue.

Q. What is the name of the business located at that address? A. It is in the Harth Building.

Q. What is the name of the concern with which you are connected? A. The Marvel Drug Company.

Q. Are you the owner or an employee of the Marvel Drug Company? A. An employee.

Q. How long have you been employed there? [4]

A. 13 years.

Q. Did you know Abe Lutz in his lifetime?

A. I did.

Q. Do you recall where he resided in 1942?

A. 220 South St. Andrews Place.

Q. How long had you known Mr. Lutz?

A. I would say around 20 years.

Q. Did he have occasion to come to the Marvel Drug Company? A. He did.

(Testimony of H. C. Ludden)

Q. During the year 1942? A. Yes, sir.

Q. Did you ever have occasion to fill a prescription for him? A. I did.

Q. You were served with a subpoena, were you not, to bring along certain records? A. Yes.

Q. Have you brought such records with you?

A. Yes, sir.

Q. Will you produce them please? Mr. Ludden, you have handed me three slips of paper, the first of which is headed Stephen G. Seech, M.D., dated January 15, 1937, and the second headed Stephen G. Seech, M.D., bearing date 10/11/37, and a third under the heading of Henry H. Lissner, M.D., and Maurice H. Rosenfeld, M.D., bearing date [5] 6/1/42. Are those papers which you have handed me taken from the records of the Marvel Drug Company? A. They are, sir.

Mr. Herndon: May I show them to counsel, your Honor?

The Court: Yes.

Q. By Mr. Herndon: Mr. Ludden, what was the practice of the Marvel Drug Company with respect to keeping and filing of prescriptions and documents of the character which you have just handed me?

A. They are numbered and filed, kept on file. We have to keep them for at least four years.

Q. And when are they filed with reference to the time when they are filled by you? A. Immediately.

Q. Is that practice uniformly followed by the Marvel Drug Company? A. Yes, sir.

The Court: It is a matter of State law, is it not, State regulation? A. Yes, sir.

Mr. Herndon: If your Honor please, I don't know whether these should be identified at this time, or whether

(Testimony of H. C. Ludden)

I should interrogate the witness without having offered them. I think, if the court please, I will offer them for identification at this time.

The Court: Very well. [6]

Mr. Herndon: The first will be the prescription under the heading of Stephen G. Seech, M.D., dated 1/15/43.

The Court: It may be received temporarily for identification, and if they are received in evidence they will bear the same number.

The Clerk: No. 5.

Mr. Herndon: The second under the heading: Stephen G. Seech, M.D., bearing date 10/11/37.

The Clerk: No. 6.

Mr. Herndon: The third prescription under the heading: Henry H. Lissner, M.D., Maurice H. Rosenfeld, M.D., bearing date 6/1/42.

The Court: They may be received and so marked.

The Clerk: No. 7.

Q. By Mr. Herndon: Mr. Ludden, I show you now Plaintiff's Exhibit No. 5 for identification, and ask you if you can tell who filled that prescription?

A. Mr. Vosmeyer.

Q. I show you now Plaintiff's Exhibit No. 6 for identification, and ask you if you can state by whom that prescription was filled?

A. That one was filled by Mr. Vosmeyer.

Q. I show you now Plaintiff's Exhibit No. 7 for identification, and ask you if you will state, if you know, by whom that prescription was filled?

A. I filled that one. [7]

Q. Do you know whether or not any of the material which appears on Plaintiff's Exhibit No. 7 for identifica-

(Testimony of H. C. Ludden)

tion was placed on the bottle or package in which that medicine was given to the patient?

A. No, there would be none outside of our prescription number; that would be the only thing to identify it.

Q. Would the name of the medicine appear on the package or bottle? A. No, sir, it should not.

Q. Do you recall the occasion of filling this prescription? A. I do.

Q. Who brought the prescription to you to be filled?

A. Mr. Lutz himself.

Q. Was that done on or about the date the prescription bears, that is, June 1, 1942?

A. It was done on the date that that is typewritten. There is a date printed there in typewriting. It was filled on the 1st of June, 1942.

Q. On that occasion, Mr. Ludden, did Mr. Lutz express to you anything to the effect that he was suffering from any pain or illness?

Mr. McGINLEY: If your Honor please, I object to the question on the ground that it calls for the opinion and conclusion of the witness, and also upon the ground that as against the plaintiff's beneficiary and counter-claimant [8] beneficiary, the evidence is incompetent, irrelevant and immaterial and hearsay.

The Court: It seems to me that the second objection is sound. You are calling for oral statement of a decedent which would be hearsay, as to the counterclaimant, would it not?

Mr. Herndon: I would submit, your Honor, that it comes within several exceptions to the hearsay rule. First and primarily, a well-recognized exception to the hearsay rule relates to the expressions of present pain

(Testimony of H. C. Ludden)

and suffering; second, it is our contention that as to the insured and defendant beneficiary, Harry Lutz, or his privity, that declarations of the insured are binding against the beneficiary who is a party to the contract *ab initio*. It is subject to another exception to the hearsay rule, I think, in that it goes to the knowledge and state of mind of the insured. One of the primary issues in this case, and a very important issue in this case, is what Abe Lutz, the insured, knew on the date when he signed the application of the policy in suit. I submit to your Honor that under a well-recognized rule of law that declarations by a person whose knowledge is in question, declarations to a party whose knowledge is in question, are admissible as circumstantial evidence, of knowledge, and the introduction of such evidence does not in any way violate the hearsay rule. I don't know whether your Honor has access in your Honor's library to Corpus [9] Juris Secundum, but there is a very excellent article on evidence, and with your Honor's permission I will read some excerpts from it. It follows the rules laid down by Wigmore.

The Court: I am very familiar with that. Taking up your first point, which you made, and to clarify our thinking, in an accident case, where a man spontaneously, as a part of the accident, for instance, says: "Oh, my God. I can't see; I am blind," even though that would possibly be hearsay it is permitted for very definite reasons of evidence, and very sound ones; but here a man comes into a pharmacist to have a prescription filled, and in connection with the filling of that prescription he makes a statement, to illustrate, that he is having a lot of pain or pressure in his chest, and he asks the pharmacist if the

(Testimony of H. C. Ludden)

pharmacist thinks that will do him any good. It seems to me there is quite a distinction between that situation and one which we customarily have in connection with some accident, for instance, but I would like to hear what you have in the way of authorities on that. There are getting to be so many exceptions to the hearsay rule nowadays that exceptions to the hearsay rule become to some extent a thing of the past. The proposed rules on the introduction of evidence are almost going to take the bottom right out of the hearsay rule.

Mr. Herndon: As I say, your Honor, I think these [10] statements in *Corpus Juris Secundum* are very clear, and they follow Wigmore, and the authorities are numerous. With your Honor's permission, I will read a few excerpts that bear on the matter. I am going to read from Volume 31 *Corpus Juris Secundum*. First, I should like to read Section 257, under the title Evidence, at page 1009:

"The existence of knowledge may be shown, or the absence of knowledge may be shown by declarations of the person whose knowledge is of importance, even though such declarations were made a considerable time before or after the time involved in the inquiry, provided there is not such an element of remoteness as destroys materiality."

The Court: That is perfectly clear, where the man is alive and available to deny it. Here the man is deceased, and you come against other rules. Go right ahead.

Mr. Herndon: "Where a person's knowledge of a particular fact is relevant, it may be shown that an unsworn statement of another person as to its existence was brought to his attention in the same way that any

(Testimony of H. C. Ludden)

other relevant statement may be shown to have been made to him. It is accordingly permissible to show direct and specific statements, such as advice, information, instructions, notices, representations, or threats. The evidence offered must in all cases have a logical tendency to establish the fact of knowledge, but, provided the time is not too remote, statements made to a person whose knowledge is relevant may be [11] shown, although made a considerable time before the time when such knowledge is relevant."

The Court: There can be no question about the soundness of that rule of law, where a man who made the statement is available to testify, and there can be no danger in it, of course; but here is a different situation, where the man is dead, and is unable to testify. Doesn't that make all the difference in the world?

Mr. Herndon: I submit, it does not, your Honor, because the unfortunate circumstance that the man whose knowledge is in question is deceased, does not in any way affect the relevancy of the issue. The question of what he knew we can prove only by circumstantial evidence.

The Court: There is no question about its relevancy. The question is whether you can prove it or not. But isn't it a fundamental principle that you can't bring into court the statement of a deceased in an action involving the executor of his estate? Isn't that a fundamental principle of evidence in California?

Mr. Herndon: I think not. I think the decision by Judge Wilbur in the Gill case, to which I referred in the pre-trial brief, where knowledge is in issue, the question of the decedent's knowledge, statements made by him indicating his knowledge of the fact, are admissible. State-

(Testimony of H. C. Ludden)

ments made to him, which knowledge brought to his attention the fact in question, are admissible. [12]

The Court: In order to save time, suppose we do it this way: There being no jury here, and certainly it would not have any affect upon the court, in order to save the necessity of bringing this man back, let us take this testimony with the understanding that I am going to take the ruling on the matter under advisement, subject to a motion to strike. Then you gentlemen can file any authorities that you may have on the subject. I think this is a very close point, and that it ought to be carefully considered. I think it will save a lot of time. May it be so stipulated?

Mr. McGinley: So stipulated.

Mr. Herndon: Yes.

The Court: It will be admitted subject to a motion to strike. With that understanding, Mr. Witness, you may answer.

A. Mr. Lutz came in and simply handed me the prescription, and made the remark that he did have a pain in his chest, and would like to have the prescription as soon as possible.

Q. By Mr. Herndon: Did you have occasion to refill the prescription for nitroglycerine, which has been identified as Plaintiff's Exhibit No. 7 for identification?

A. Many times.

Q. How many times would you estimate, Mr. Ludden, did you refill the prescription which is Plaintiff's Exhibit [13] No. 7 for identification, between June 1, 1942 and October 31, 1942, if you can estimate it?

A. That would be pretty hard to state.

Q. Would you say as much as twice?

A. I would say about four times.

(Testimony of H. C. Ludden)

Q. And on any of those other occasions did Mr. Lutz make any statement to you with respect to suffering from any pain of any kind?

Mr. McGinley: If your Honor please, may it be understood that the objection I previously made goes to this line of interrogation?

The Court: The same objection may be shown to have been made, and the same ruling and the same stipulation.

A. Not that I recall.

Q. By Mr. Herndon: In what sort of package or bottle are the nitroglycerin tablets referred to in Plaintiff's Exhibit No. 7 placed when you deliver them to the purchaser? A. A small bottle.

Q. Do I understand it correctly that you testified that no part of the material which appears on the prescription is placed by you on the bottle?

A. There is no name put on the bottle. We don't put it on there.

Q. Will you tell us whether any part of the material which appears on the face of Plaintiff's Exhibit No. 7 for identification was placed by you on the bottle when you [14] filled this prescription and delivered it to Mr. Lutz?

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to the question upon the following grounds: First, that it is incompetent, irrelevant and immaterial; secondly, that there has been no proper foundation laid for the question, and third, that the answer to the question at this stage of the proceedings would call for a disclosure of information which is privileged under section 1881, subdivision 4, of the Code of Civil Procedure of the State of California in that the documents which have been identified purport to be pres-

(Testimony of H. C. Ludden)

criptions from a physician who treated the decedent, Abe Lutz, in his lifetime, and any of the information appearing on the documents for identification which is expressive of the diagnosis or the treatment recommended for the deceased is subject to the prohibition of subdivision 4, section 1881, of the Code of Civil Procedure, and on the last ground, that the evidence called for by the question would not be the best evidence.

The Court: What have you to say about that?

Mr. Herndon: On the matter of privilege, if your Honor please, I do not understand that privilege extends to the information disclosed to a pharmacist. I don't understand that the statute so far extends, in the second place, to the matter of privilege. We have offered in evidence, and there has been received in evidence an [15] express waiver of the privilege by the patient, which is *prima facie* presumptively valid and binding upon the world, inasmuch as the person who gave that waiver presumptively intended to give it, and there is no person now living who has any right to challenge it or to dispute it, and more particularly, it has not been disputed or challenged here in any competent way. There is no competent way by which it can be done. In the next place, if your Honor please, if the validity or effectiveness of the waiver which is expressed in the policy depends upon the determination of any factual matter, which we submit it does not, that factual matter cannot be determined probably until the last witness in rebuttal is called in this case, so, *prima facie*, as the record now stands, clearly the evidence is admissible. So far as the best evidence rule is concerned, that rule does not mean as much as I think most lawyers think. It is a matter within the discretion of the court.

(Testimony of H. C. Ludden)

The Court: I think the objection is sound on the ground that the proper foundation has not been laid for the asking of the question. However, counsel may interrogate counsel for the defendant to find out if they do have the bottle available, before proceeding as a part of the foundation. On the other point, I haven't the California Code immediately in front of me, and I have forgotten just what its provisions were, but I do not remember that communications between a man filling the [16] prescription, a pharmacist, were privileged. So far as the privilege between the doctor and the patient is concerned, assuming for the purposes of argument that that privilege was not expressly waived in the application, there is still another principle of law which you run counter to. To illustrate, if another person is present at the time of the conversation between the doctor and the patient, the privilege is undoubtedly waived, and the third party may testify.

Mr. McGinley: Your Honor, I concede the rule in regard to disclosure made by the patient to a third person, that in some cases the privilege may be waived. Typical of those cases are those where the patient voluntarily puts his doctor on the stand and elicits information concerning his ailments and treatment, and then later should attempt to assert the privilege, courts hold that he is estopped to assert the privilege under this action.

The Court: That situation of which you speak is something entirely different. It is not a question of estoppel; it is a question of practical and substantive law.

(Discussion.)

The Court: Fortunately there is no jury here, and I am satisfied that the answer to this question is not going

(Testimony of H. C. Ludden)

to prejudice the court, who is used to these things. We are not going to be able to tell almost until the end of this trial just what the situation is going to be. I think we [17] had better take this evidence subject to a motion to strike, so may it be stipulated that we will reserve the ruling subject to a motion to strike, just as I did before?

Mr. Herndon: So stipulated.

Mr. McGinley: So stipulated, if your Honor please.

Mr. Herndon: I wonder if your Honor would propound the question to counsel as to whether this bottle in which this medicine was contained is in existence?

The Court: Yes, is this bottle in existence?

Mr. McGinley: Your Honor, I have never investigated. The deceased's son is here, if I may be permitted to ask him in open court?

The Court: Yes.

Mr. McGinley: Mr. Harry Lutz, do you have in your possession the bottles containing the medicine that your father took during the year 1942, and particularly during the months of June to October, 1942?

Mr. Harry Lutz: Not that I know of.

Mr. McGinley: During the noon hour can you make an examination and find if any of those bottles are available, or the containers which contained medicine during that period?

Mr. Harry Lutz: Yes.

Q. By Mr. Herndon: Mr. Ludden, do you know the practice among pharmacists generally, as it existed during 1942 with reference to placing instructions, or any matter

(Testimony of H. C. Ludden)

or material on a bottle or container of medicine, as set forth in the [18] prescription?

A. We only put on the direction that the doctor gives us, unless he so states on the prescription that we shall label what it is; otherwise we do not do so.

Q. Do I understand your answer to be that you place on the bottle only the directions for its use, unless the doctor specifies something else be placed on it?

A. Yes, sir.

The Court: You are familiar with the custom among the reputable pharmacists, are you not? A. Yes.

Q. That is the universal custom? A. Yes.

Q. Where you have nitroglycerine in the prescription, do you put any danger signal on the bottle such as Danger, Poison, Caution? A. Not necessarily.

Q. What is the custom?

A. We put on the doctor's directions only.

Q. So far as you know, that is what you did in this particular case? A. Yes, sir.

Q. By Mr. Herndon: Mr. Ludden, will you refer to Plaintiff's Exhibit No. 7 for identification, and state whether any of the material appearing on the face of that exhibit was placed by you on the bottle which was delivered [19] to Mr. Lutz?

A. Nothing but the directions.

The Court: The number, the name, the doctor's name, the directions were all on there, were they?

A. Yes, sir.

(Testimony of H. C. Ludden)

Q. By Mr. Herndon: Please read to us the part or parts, if any, on that exhibit, which is Plaintiff's Exhibit No. 7, which you placed on the bottle.

A. The words: Prescription No. 89543. Dr. M. H. Rosenfeld. Dissolve one tablet under tongue for heart pain. Mr. Lutz. 6-1-42.

Q. Do I understand that that portion of the exhibit which you have just read was placed by you on the label of the bottle? A. Yes, sir.

Mr. Herndon: That is all.

The Court: You may cross examine as to those particular questions. You may cross examine without prejudice, under the stipulation, because we won't bring the man back, so if you have any questions on cross examination as to those matters about which you objected, you may cross examine without prejudice. May it be so stipulated, gentlemen?

Mr. McGinley: So stipulated.

Mr. Herndon: So stipulated. [20]

Cross-Examination

Q. By Mr. McGinley: Mr. Ludden, referring to the conversation that you state occurred with the deceased, Mr. Lutz, at the time he first brought in the prescription, I understood that it was your statement that the deceased said he had pain in the chest, is that right?

A. Yes, sir.

Q. You are quite sure it was pain in the chest, instead of pain in the heart?

A. So far as I know, he did not mention the heart.

Q. And on the bottle of medicine which you filled from the prescription what is your best judgment as to

(Testimony of H. C. Ludden)

whether you made the prescription "Pain in the chest" or "Pain in the heart"?

A. For heart pain, as the prescription is written. The directions of the doctor are for heart pain.

Q. Is it always your policy, Mr. Ludden, to put the nature of the illness of one who has a prescription filled in addition to the directions on the bottle?

A. Not unless the doctor so states.

Q. Would you refer to the prescription which counsel has handed to you, and read into the record any directions from Dr. Rosenfeld referring to placing the inscription "Pain in heart" or "Heart pain" on the bottle?

A. Do you mean you want the directions as he has written them here? [21]

Q. I understood you to say that you don't put the nature of the illness, or the complaint, unless the doctor directs? A. That is correct.

Q. Will you examine Dr. Rosenfeld's prescription and read into the record, if there are any directions there, directions to you to inscribe on the bottle of medicine "Heart pains" or "Pains in heart"?

A. Dissolve one tablet under tongue for heart pains.

Q. Was it that part of the prescription that you construed as the direction to you to put the inscription on the bottle? A. It is, sir.

The Court: In other words, you took that to be the same thing as a direction such as "Take one tablet after every meal"? A. Yes, sir.

Q. By Mr. McGinley: Do you keep as part of your records a copy of the matter that appears on the label on the bottle? A. No, sir.

(Testimony of H. C. Ludden)

Q. Is there any record that you have, and which you keep as a part of your business records, where you make a duplicate prescription?

A. No, sir, not unless the patient asks for a copy of the prescription, which we sometimes are allowed to give, and sometimes we are not. [22]

Q. By the Court: In other words, you keep the original prescription in your file? A. Yes.

Q. You show it is filled, and do not make any copy of it unless the person who is asking for the prescription to be filled requests it, and you are allowed under the regulations to do it? A. Yes, sir.

Q. By Mr. McGinley: Mr. Ludden, do you have with you, other than the prescription, any communications with Dr. Rosenfeld regarding the decedent?

A. No, I think those other two prescriptions are from another doctor.

The Court: Speak up.

A. Other than those two prescriptions from some other physician. May I see those? No, sir, I haven't. That's the only prescription I have from Dr. Rosenfeld.

Q. By Mr. McGinley: In giving your testimony, Mr. Ludden, that in June of 1942 you placed this inscription on the bottle, that is based on your recollection rather than any records you have in your possession, is it not?

A. What do you mean, these directions?

Q. No, in giving your testimony, Mr. Ludden, that you placed the inscription of the type that you have testified to on the bottle, in June of 1942, you gave that testimony based on your recollection rather than based on any record that you [23] have in your possession?

(Testimony of H. C. Ludden)

A. I have got the record here. The prescription the physician signed is a prescription we always put on—what the directions are. There is no guesswork about it. It must go on that way.

Mr. McGinley: That is all, your Honor.

Mr. Herndon: May I ask a question which perhaps I should have asked on direct examination?

The Court: Yes.

Further Direct Examination

Q. By Mr. Herndon: Mr. Ludden, I ask you to examine Plaintiff's Exhibit No. 7 for identification, and state whether or not that exhibit is in the same condition now that it was when it was handed to you by Mr. Lutz?

A. It is, yes, sir.

Q. Have you produced all of the prescriptions that you can find, which you filled for Mr. Lutz?

A. I have.

Mr. Herndon: That is all, your Honor.

The Court: Is the same thing true of the other two prescriptions, that they are in the same condition as when you received them? A. Yes, sir.

Mr. Herndon: Before the witness leaves the stand, your Honor, I would like at this time to offer in evidence Plaintiff's Exhibits 5, 6 and 7 for identification. [24]

Mr. McGinley: If your Honor please, may it be understood that the offer in evidence is subject to the previously stated objection?

The Court: It may be so stipulated, and the same ruling, and the same receipt subject to a motion to strike.

Mr. Herndon: So stipulated.

(Testimony of H. C. Ludden)

Q. By the Court: Do I understand that these prescriptions were kept as a regular custom and practice in connection with your drug store, and that they are part of the records of the Marvel Drug Company? A. Yes.

Q. Kept in the regular course of business?

A. We have to keep them. That's the law.

The Court: They may be received subject to the stipulation.

The Witness: May we have these prescriptions back?

The Court: You may have them after the case is concluded. They will be kept by the clerk, just as safely as though in a vault. [25]

* * * * *

MAURICE H. ROSENFELD,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name.

A. Maurice H. Rosenfeld.

Direct Examination

Q. By Mr. Herndon: What is your profession?

A. Physician.

Q. Are you licensed to practice your profession in the State of California? A. Yes, sir.

Q. How long have you been so licensed?

A. Since 1929.

Q. Will you state generally what your medical training and experience has been?

A. I have had post-graduate work in internal medicine and the subject of heart disease.

(Testimony of Maurice H. Rosenfeld)

Q. Do you specialize in diseases of the heart?

A. I do.

Q. Do you exclude other practice? A. No, sir.

Q. You have some general practice?

A. The practice of internal medicine, sir.

Q. The general practice of internal medicine, but you specialize primarily, do you not, in the heart?

A. Yes, sir. [44]

Q. Where do you maintain your office?

A. 1908 Wilshire Boulevard.

Q. For how long have you officed at that place?

A. Approximately eight years.

Mr. Herndon: I take it, your Honor, perhaps, counsel will stipulate to Dr. Rosenfeld's professional qualifications?

Mr. McGinley: So stipulated, your Honor.

The Court: The stipulation will be received.

Q. By Mr. Herndon: Did you know Abe Lutz in his lifetime? A. Yes, sir.

Q. About how old a man was he at the time of his death?

A. I would have to look at my records for that, sir.

Q. Approximately.

A. I would have to look at my records for that sir.

Mr. McGinley: Your Honor, this is probably an appropriate time for me to make an objection which I would like to have continued with the doctor's testimony. May I state my grounds now?

The Court: Yes.

Mr. McGinley: If your Honor please, the defendants and counterclaimant Harry Lutz, object to Dr. Rosenfeld's testimony on disclosing any information acquired from Abe Lutz, the deceased, in his lifetime, which was neces-

(Testimony of Maurice H. Rosenfeld)

sary to administer and prescribe treatment, on the following grounds: [45] (1) That the disclosure of such matter constitutes privileged communications under Sub 4, Sec. 1881, of the Code of Civil Procedure. (2) That Dr. Rosenfeld, being a licensed physician, and coming within the terms and provisions of Sec. 1881, Sub 4, is not competent to testify as to such matters, on the ground that they are privileged. (3) That under the section quoted the testimony to be given by the doctor would be also incompetent: and, lastly, that any testimony or disclosure of information obtained by Dr. Rosenfeld from the deceased, Abe Lutz, during his lifetime, at the time when the relationship of physician and patient existed, subsequent to November 16, 1942, is not part of the *res gestae*, and constitutes hearsay, and is not binding on the defendants and counterclaimant in this proceeding. I would like, if it is agreeable to your Honor, so I won't interrupt, to have that continuing objection to all of the testimony which Dr. Rosenfeld will give.

The Court: May it be stipulated that the objection indicated by counsel for the defendants may be deemed to run to each and every question of the doctor; and that the testimony may be received subject to a motion to strike, just as he has done in connection with the other testimony relative to this matter?

Mr. Herndon: Plaintiff so stipulates.

The Court: Does the defendant so stipulate?

Mr. McGinley: So stipulated. [46]

The Court: You may answer. You know his age at the date of his death, don't you?

Mr. McGinley: Yes.

The Court: May it be stipulated to what it was?

(Testimony of Maurice H. Rosenfeld)

The Witness: 65.

Mr. McGinley: I think it was 65.

The Court: Yes.

Q. By Mr. Herndon: When did you first become acquainted with Mr. Lutz? A. 1937.

Q. Will you state under what circumstances you became acquainted with him?

* * * * *

Q. By whom was he referred to you?

A. Dr. Fred Polesky.

Q. What did you say was the date of the first consultation? A. January 16, 1937.

Q. What complaints, if any, did the patient register at the time of that consultation?

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to the last question on the grounds as follows: That a consultation in January, 1937, is immaterial to any of the issues to be tried in this case in [47] that the application which was made part and parcel of the policy in suit, specifically Question 36, is as follows: Have you consulted or been examined by a physician or other practitioner within five years? And the application is dated November 16, 1942, and the consultation concerning which the question is directed to occurred at a time beyond five years from November 16, 1942, and would not come within any of the purported representations in the policy.

Mr. Herndon: Counsel, if your Honor please, has overlooked Question 35, which is: Have you suffered from (a) Indigestion? (c) Nervous strain and depression?

(Testimony of Maurice H. Rosenfeld)

The Court: I am familiar with that. It may be received, subject to the same stipulation as to a motion to strike.

A. The patient complained of dizziness and inability to arise the week before the examination of January 16, 1937.

Q. By Mr. Herndon: Did the patient at that time relate to you any other history?

A. He was perfectly well, except for this one complaint.

Q. Which I believe you said was dizziness and vertigo?

A. Dizziness and vertigo and inability to get out of bed that morning.

Q. On that occasion did you make an examination?

A. Yes.

Q. Of what did that examination consist?

A. This was the week following that complaint. He had [48] a complete physical examination, a complete laboratory study and electrocardiograph study.

Q. Did you take his blood pressure? A. Yes.

Q. What was it? A. 134 over 90.

Q. You took an electrocardiogram? A. Yes.

Q. Do you have that with you, doctor?

A. I do.

Mr. Herndon: I will introduce this. It may be marked for identification?

The Court: It may be marked for identification.

The Clerk: Plaintiff's Exhibit No. 12.

Q. By Mr. Herndon: Did you read the electrocardiogram? A. Yes, sir.

Q. What did it show, if anything?

A. No significantly abnormal changes.

(Testimony of Maurice H. Rosenfeld)

Q. Of what else did your examination consist?

A. Of the blood count, urinalysis, and fluoroscopic examination of the chest.

Q. What was your diagnosis, doctor, if you made one?

A. Probable slight stroke.

Q. Will you tell us what a stroke is? What do you mean by that term? [49]

A. The breaking of the closure of a small blood vessel in the brain.

Q. From a medical standpoint, doctor, is the result of that ailment or stroke serious or otherwise?

A. This was suspected as being very mild.

Q. Is there any other name, medical name, for it?

A. Hemiplegia.

Q. Did you find any arteriosclerosis on the occasion of that examination? A. Yes.

Q. What is arteriosclerosis?

A. Hardening of the arteries.

Q. Is that disease of arteriosclerosis one which is transitory, or is it progressive or chronic?

A. It is progressive and chronic.

Q. What treatment, if any, did you prescribe for the patient on the occasion of your first consultation?

A. I advised rest and further observation.

Q. Did you prescribe any medicine? A. None.

Q. What, if anything, did you tell the patient with respect to his condition on the occasion of your first consultation?

A. He was advised that this condition had to be observed, first, to make sure that this was not a progressive condition, and to complete the diagnosis. [50]

(Testimony of Maurice H. Rosenfeld)

Q. Did you tell the patient that he had suffered a stroke?

Mr. McGinley: I object to that as leading and suggestive.

The Court: Objection sustained.

Q. By Mr. Herndon: What, as nearly as you can remember, did you tell the patient with respect to your conclusions as to his condition?

A. I advised the patient that he had a mild stroke, in that he had symptoms which were suggestive, and that together with the report by an eye specialist, who I had seen, suggested this condition, and for that reason I advised him of this possible diagnosis.

Q. Who was the eye specialist?

A. Dr. Stephen Seech.

The Court: Of this possible diagnosis—for the record, what do you mean by that? A. A stroke.

Q. By Mr. Herndon: When next did you see Mr. Lutz professionally? A. June 1st, 1942.

Q. What history, if any, did the patient relate to you on the occasion of that consultation?

A. The patient was complaining of pain in the heart region.

Q. What other history, if any, did he give you? [51]

A. He complained when on excitement, or on strain or effort, he was subject to pain around his heart region.

Q. Was there any indication by him as to the severity or otherwise of the pain? A. They were mild.

Q. Was there any indication by the patient as to the duration of time he had suffered such pain?

A. He just stated that they had lately occurred.

(Testimony of Maurice H. Rosenfeld)

Q. Did you make an examination on June 1, 1942?

A. I did.

Q. Of what did it consist?

A. It consisted of a complete physical examination and an electrocardiographic study, and further study of his blood, his blood sugar, blood count and urinalysis.

Q. What did you find with respect to blood sugar?

A. He had an elevated abnormal blood sugar.

Q. What did you find with respect to blood pressure?

A. The blood pressure was slightly elevated.

Q. Have you a record of what it was?

A. 166 over 90.

Q. How much does that vary from normal, considering the age of the patient?

A. It is only slightly above normal.

The Court: Systolic? A. Yes.

The Court: The diastolic was normal? [52]

A. Yes.

Q. By Mr. Herndon: Did you have an electrocardiogram? A. Yes, sir.

Q. Have you it with you? A. Yes, sir.

Q. What, if anything, does it show with respect to the condition of the heart?

A. It shows a slight abnormality of the heart.

Q. Of what kind or character of abnormality?

A. In view of the medical history this would be suggestive of a mild coronary ischemia.

Q. Explain that to us a little further, doctor.

A. That is a deficiency of blood supplied to the heart muscles, because of the narrowing of the coronary arteries.

(Testimony of Maurice H. Rosenfeld)

Q. Could that be properly described as a recognized disease of the circulatory system? A. Yes, sir.

Q. State whether or not such disease is considered by the medical profession to be transitory, chronic or otherwise? A. The ischemia is transitory.

Q. Is there any part of the disease which is chronic?

A. The probable narrowing of the coronary arteries is chronic.

Q. In your opinion is such narrowing of the arteries [53] likely to be progressive in character or otherwise?

A. Probably progressive.

Q. Have you fully stated to us the diagnosis you made on that second consultation in June, 1942?

A. The diagnosis was probably angina pectoris, probably due to the coronary artery narrowing.

Q. What, doctor, is angina pectoris?

A. It is an acute pain, complained of by the patient, referable to the heart region, that is usually brought on by emotional strain, unusual effort, or overeating.

Q. What are the symptoms of this disease?

A. Pain in the region of the heart.

Q. Is that pain severe or otherwise?

A. It varies; it may be very intense; it may be very mild.

Q. What treatment, if any, did you prescribe on that occasion, doctor?

A. He was to curtail his activities; he was put on a diet to reduce weight, and to improve this potential diabetic condition. He was also given nitroglycerin for relief of the pains of angina pectoris.

(Testimony of Maurice H. Rosenfeld)

Q. Now I show you, doctor, Plaintiff's Exhibit No. 7 in evidence, and I will ask you whether or not you have previously seen that exhibit? A. Yes, sir.

Q. By whom was it prepared, if you know—that is to [54] say, the handwriting thereon?

A. It is my writing.

Q. Did you deliver that prescription to Mr. Lutz?

A. Yes, sir.

Q. On the date of your second consultation in June, 1942? A. Yes, sir.

Q. What, if anything, did you tell the patient about his condition at that time?

A. He was explained that the pain that he complained of was due to the heart itself, and that the diagnosis of angina pectoris was suspected. He was also told about the potential diabetic condition.

Q. When next did you have occasion to examine or see Mr. Lutz in your professional capacity?

A. He was seen again on June 5, 1942.

Mr. Herndon: Pardon me, your Honor, I neglected to give the second electrocardiogram. You have now handed me an electrocardiogram dated June 1, 1942, as the one to which you have previously referred in your testimony.

A. That's right.

The Court: It may be received under the stipulation, and marked in evidence.

Q. By Mr. Herndon: Of what complaints, if any, did the patient complain on the occasion of your third consultation? [55] A. He had none.

(Whereupon an adjournment was taken until 2 o'clock p. m. of this same day.) [56]

AFTERNOON SESSION

2:00 P. M.

MAURICE H. ROSENFELD

recalled.

Further Direct Examination

Q. By Mr. Herndon: Doctor, pursuant to subpoena, have you brought with you any other electrocardiograms than those which we have heretofore referred to?

A. Yes, I have.

Q. Will you produce them at this time, please? How many of them are there, doctor?

A. There are five, sir.

Mr. Herndon: If your Honor please, for the purpose of saving time, and for convenience, may these five electrocardiograms, bearing date June 3, 1942, June 5, 1942, July 6, 1942, July 12, 1942, and August 10, 1942, be marked for identification?

The Court: They may be received, as one or separately?

Mr. Herndon: Separately, if you please. May the reporter read the last question, your Honor?

(Question read by the reporter.)

Q. You may answer the question.

A. He had no complaints on that day. That was June 5, 1942. [57]

Q. Was that the time when you said he came back to get the results of his previous examination?

A. Yes.

Q. Ekg, and the other blood studies, you made no examination on that date, or did you?

A. No, that was just a report, an electrocardiogram recheck.

(Testimony of Maurice H. Rosenfeld)

Q. June 5, did you take another electrocardiogram?

A. I did.

Q. What, if anything, did you report to the patient on that day?

A. I mentioned the diagnosis of angina pectoris, and advised him about his activities, and its bearing upon this suspected heart condition.

Q. Do you recall whether or not you explained to him what angina pectoris was?

A. The condition was explained.

Q. I show you, Doctor, Plaintiff's Exhibit 13 in evidence, and I will ask you if it was that electrocardiogram that you took on your June 1st examination?

A. Yes, it was.

Q. Was it that electrocardiogram you discussed with Mr. Lutz on June 5th? A. Yes, sir.

Q. I now hand you an electrocardiogram dated June 3, 1942, being Plaintiff's Exhibit No. 14 for identification, [58] and I will ask you when that was taken?

A. This electrocardiogram was taken along with the blood studies on June 3, 1942.

Q. Was Mr. Lutz in your office on June 3, 1942?

A. Yes, he was.

Q. Was any other examination made on June 3 than the taking of the electrocardiogram?

A. That was just laboratory studies done by my technician.

Q. Referring to plaintiff's Exhibit 14 for identification, will you state what, if anything, it shows with respect to the heart condition?

A. There is an abnormality in the electrocardiogram.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to the witness testifying to what any of the electrocardiograms show, on the ground that there has been no foundation laid in that such information was communicated to the decedent, Abe Lutz. If I can add to that, not in the way of argument, but by way of explanation, I have assumed that this line of testimony is being offered to show knowledge on the part of the deceased applicant that he had certain infirmities in the heart. Now, it would be, I submit, your Honor, wholly immaterial if the doctor made a complete and thorough study of the electrocardiograms unless he explained to the applicant the study that he had made, and his opinion at that time as to what it showed, [59] unless it was communicated in those words to the applicant, it would be immaterial.

The Court: I think that the foundation, if it exists, should be laid, because it might be an important element. I shall not foreclose myself from saying what my opinion would be, if it were not, but let us see if the foundation can be laid first.

Q. By Mr. Herndon: Referring, Doctor, to Plaintiff's Exhibit No. 14 for identification, I will ask you whether you told Mr. Lutz, or explained to Mr. Lutz, what was indicated by that electrocardiogram?

Mr. McGinley: If your Honor please, I object to that as leading and suggestive.

The Court: I don't think so. He is asking him if he told him what that meant. Just answer yes or no.

A. Yes.

(Testimony of Maurice H. Rosenfeld)

The Court: What did you tell him?

A. The patient was advised that there was some abnormality in this cardiogram not seen in the previous studies which indicated that the pains that he complained of were due to his heart, and suggested angina pectoris.

Q. Did you, in each instance, where you took an electrocardiogram, show it to him and explain to him what your judgment was as to what it showed?

A. Every time he visited and a cardiogram was taken, an interpretation was explained to the patient. [60]

Mr. Herndon: Perhaps counsel does not desire that I show him each of these.

Mr. McGinley: May I ask one question related to my objection, your Honor?

The Court: Yes. You mean on voir dire?

Mr. McGinley: Yes.

Q. Dr. Rosenfeld, on the occasion that you are about to testify, when Mr. Abe Lutz was at your office, did you exhibit to him physically the electrocardiogram that you now have in your possession? A. No, sir.

Q. You had that in your own personal file?

A. That's right, sir.

Q. And is this a fair statement of what you did: When Mr. Lutz came in, after your having personally examined the electrocardiogram, and you determined professionally what it meant, you conveyed that meaning to him personally without an exhibition of the electrocardiogram? A. Yes, sir.

Q. Was that the practice which was followed with respect to all of the electrocardiograms?

A. Yes, sir.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: In view of that, your Honor, we urge the objection previously stated, that the witness' interpretation of the electrocardiogram at this time, unless it was communicated to the decedent as to the readings of the [61] electrocardiogram, it would be immaterial.

The Court: I think they would be entitled to introduce them in explanation of the witness' testimony, although they would not have the same effect as though they had been shown, but only for that limited purpose they may be received.

Q. By Mr. Herndon: On what date was it, Doctor, that you explained to Mr. Lutz the meaning or the interpretation shown by Plaintiff's Exhibit 14?

A. On June 5, 1942.

Q. Then, Doctor, on June 5, 1942 did you take any other electrocardiograms of Mr. Lutz?

A. There was one taken on that date.

Q. I show you Plaintiff's Exhibit No. 15 for identification, and I will ask you whether or not that is the electrocardiogram taken on June 5, 1942?

A. Yes, it is.

Q. What other examination did you make on June 5, 1942, Doctor?

A. That was just the report of the entire previous examinations; also the report on the three electrocardiograms taken on June 1, June 3 and June 5.

Q. I believe you have heretofore testified that you explained to Mr. Lutz what was shown by those three electrocardiograms? A. I did.

Q. Now, I will ask you to tell us, Doctor, what is [62] shown by the electrocardiogram which is Plaintiff's Exhibit No. 14 for identification?

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: If your Honor please, that question is objected to on the ground—

The Court: The objection will be sustained. You may ask him what he told the patient, if you wish.

Q. By Mr. Herndon: Doctor, will you tell us what you told Mr. Lutz with respect to your findings, or your readings of the three electrocardiograms, which are Plaintiff's Exhibits Nos. 13, 14 and 15?

A. In view of the fact that these electrocardiograms showed variations, definite variations from the one taken in 1937, together with the history of pain about the heart on exertion, and on motion, the patient was informed that all of these things mean angina pectoris, and he was advised as to the care of this condition.

Mr. Herndon: At this time, your Honor please, I wish to offer in evidence—

Mr. McGinley: If your Honor please, the defendants urge the same objection that was heretofore urged with reference to the physical electrocardiograms.

The Court: Only for the limited purpose may it be received to explain the testimony of the witness. I understand you have now told us what you told him with regard to just one of these electrocardiograms, is that true?

A. No, sir, the interpretation of all four; the one in [63] 1937 was fairly normal, and the variation of these three.

The Court: They were all explained?

A. They were all explained.

Mr. Herndon: I now offer in evidence, your Honor, Plaintiff's Exhibits 12, 13, 14 and 15 for identification, which are the electrocardiograms to which the witness has just referred.

(Testimony of Maurice H. Rosenfeld)

The Court: They may be received and marked with the same numbers for the purpose indicated.

Q. By Mr. Herndon: Doctor, when next after June 5, 1942 did you see Mr. Lutz in your professional capacity? A. July 6, 1942.

Q. What history, if any, did the patient relate on that occasion?

A. The patient stated that he felt very much better, and that he was contemplating taking a vacation. He had cut down on his activities, and his symptoms had disappeared.

Q. What examination did you make on that day?

A. A clinical examination was made.

Q. Did you take an electrocardiogram on that day?

A. I have the electrocardiogram, sir. I would like to see the date.

Q. I now hand you Plaintiff's Exhibit No. 16 for identification.

A. This was the electrocardiogram taken on July 6, 1942. [64]

Q. I will show you an electrocardiogram dated June 12, 1942, being Plaintiff's Exhibit No. 17 for identification. I will ask you when that electrocardiogram was taken.

A. This was taken on June 12, 1942. I would like also to correct my previous statement that he had been seen after June 5. He was also seen on June 12, and at that time this cardiogram was taken.

Q. Did you make any other examination on June 12?

A. On June 12 he had a complete physical examination besides the electrocardiogram.

(Testimony of Maurice H. Rosenfeld)

Q. What were your findings on June 12?

A. They were essentially the same as those on June 5, except that the patient was having pain; their occurrence was less frequent.

The Court: Did you tell him your findings?

A. Yes.

Q. By Mr. Herndon: Did you on that occasion explain any electrocardiograms to him?

A. Yes, sir, after each taking I examined it, and the electrocardiogram was interpreted in language a layman would understand.

Q. Is that true with reference to Plaintiff's Exhibit 17 for identification? A. Yes, sir.

Q. What did you tell the patient with reference to Plaintiff's Exhibit 17 for identification? [65]

A. The instructions were the same as in the previous examination, as to the advisability of reducing his activity and he was again given nitroglycerine for his pain, and he was told that this cardiogram was very similar to the previous ones.

Q. When next, after June 12, did you see Mr. Lutz in a professional capacity? A. On July 6, 1942.

Q. Did the patient relate any history to you at that time?

A. The patient stated then that he was feeling very much better.

Q. Did he register any complaints, or tell you of any pains? A. No, sir, he had no complaints.

Q. Did you make an examination on that day?

A. Yes, sir.

(Testimony of Maurice H. Rosenfeld)

Q. Of what did it consist?

A. It consisted of a physical examination, and you have the electrocardiograms. I cannot recall from my record whether one was taken then.

Q. I will hand you Plaintiff's Exhibit No. 16 for identification, and I will ask you whether or not that electrocardiogram is the one which you say was taken on that date?

A. This one is the electrocardiogram taken on July 6, [66] 1942, in conjunction with the rest of the clinical examination.

Q. Referring to Plaintiff's Exhibit 16 for identification, did you tell the patient what was indicated by that electrocardiogram? A. Yes.

Q. What did you tell him?

A. I advised him that this electrocardiogram showed no change from the previous electrocardiogram, and that he was to continue on his restricted activities.

Q. Did you make any change in your diagnosis after your examination of July 6, 1942?

A. I suspected the possibility of an acute coronary occlusion.

Q. What is the meaning of that term, Doctor?

A. An obstruction in one of the small coronary arteries that are in the heart.

Q. Did you continue to believe that the patient had arteriosclerosis and angina pectoris? A. Yes, sir.

Mr. McGinley: I object to that upon the ground that no foundation has been laid; it is immaterial unless that information was communicated to the decedent.

The Court: You had better lay the foundation, and also as to the previous question.

(Testimony of Maurice H. Rosenfeld)

Q. By Mr. Herndon: Doctor, on the occasion of your [67] consultation with Mr. Lutz on July 6, 1942, did you tell the patient what your diagnosis and conclusions were?

A. No, sir, that was just for my own information, and a follow-up for further diagnostic evidence.

Q. By the Court: Did you subsequently tell him what your suspicions were? A. Yes, sir, I did.

Q. Did you tell him that they had been confirmed?

A. No, sir.

Q. You did not tell him that they had been confirmed by any examination or any history, or any electrocardiogram?

A. I just informed him of the suspicion which was based primarily on the slight change in the cardiogram which he was told about, and also about his clinical history.

Q. Just as nearly as you can, what did you tell him?

A. That in view of the fact that he was subject to pain around his heart that occurs after exercise or effort or after emotion, together with the minor changes noted in the electrocardiogram, that it was my opinion that these were due to the heart, and they were primarily due to a condition known as angina pectoris.

Q. By Mr. Herndon: When did you tell him what you have just stated?

A. First on June 5, and on each subsequent examination.

The Court: To and including the last time you saw him? A. Yes, sir. [68]

Q. By Mr. Herndon: When next after July 6 did you see Mr. Lutz? A. On August 7th.

(Testimony of Maurice H. Rosenfeld)

Q. Did the patient give you any history at that time?

A. The patient had no complaints at that time.

Q. Did you make any examination on that day?

A. A re-examination of the blood sugar was made at that time, and a physical examination.

Q. Did you communicate to Mr. Lutz on that day your conclusions or your opinion, as to what the examination showed?

A. The examination and the discussion on that day was primarily referable to the patient's diabetic problem.

The Court: What did you tell him?

A. I told him that his blood sugar was essentially normal.

Q. By Mr. Herndon: When next did you see Mr. Lutz? A. On August 11.

Q. Did the patient relate any history to you on that day?

A. The patient had no complaints. He was re-examined, and another electrocardiogram taken.

Q. Do you have that electrocardiogram in your file, Doctor? A. I do not, sir.

Q. I will show you Plaintiff's Exhibit No. 18 for [69] identification, and ask you if that is the electrocardiogram taken on that occasion? A. Yes, that is.

Q. Did you explain to Mr. Lutz your findings from the reading of this electrocardiogram, which is Plaintiff's Exhibit 18 for identification? A. Yes, sir.

Q. What did you tell him?

A. I advised him that the condition I suspected, and that he had been instructed about before, was primarily the same; that there was no increase in impairment noticed on these subsequent examinations.

(Testimony of Maurice H. Rosenfeld)

Q. Doctor, will you tell us whether or not the disease of angina pectoris is a transitory or chronic disease?

Mr. McGinley: I object to that, your Honor, upon the ground that no foundation has been laid, unless it is shown to have been communicated in the form asked to the decedent, Abe Lutz.

Mr. Herndon: If your Honor please, this witness has already testified to his opinion that the patient, Mr. Lutz, was suffering from this disease. I think the court is entitled to know now the nature of the disease.

The Court: You may answer the question.

A. May I have the question?

(Question read by the reporter.)

A. It is a chronic disease manifested by an acute [70] exacerbation of pain.

Q. By Mr. Herndon: You attended Abe Lutz in his last illness, did you not? A. Yes, sir.

The Court: Before you go to that, did you tell the patient what your opinion of angina pectoris was as to the future? A. Yes, sir.

Q. You told him that it was something that was not just transitory, but that it would be continuous and possibly progressively worse if he did not take care of himself, did you?

A. That is usually done in a way not to cause the patient to be too apprehensive, but that sort of message is impressed upon the patient, your Honor.

Q. By Mr. Herndon: Doctor, you attended Mr. Lutz in his last illness, did you not? A. Yes, sir.

Q. What in your opinion were the immediate contributing causes of the death of Abe Lutz?

A. An acute coronary thrombosis.

(Testimony of Maurice H. Rosenfeld)

Q. Were there any other contributing causes of death?

A. He was sent to the hospital because he had an acute duodenal ulcer; that is, an ulcer of the stomach.

Q. Will you tell us, Doctor, whether in your opinion Abe Lutz was suffering from arteriosclerosis during the period [71] from June, 1942 to October, 1942?

Mr. McGinley: That is objected to, if your Honor please, on the ground that there has been no foundation laid in that this witness has not testified that he stated, in the language of the question, that Abe Lutz had arteriosclerosis. Therefore, it would be immaterial.

The Court: Let us find out. He may answer the first question.

A. The patient did have arteriosclerosis.

Q. By Mr. Herndon: Prior to November 1, 1942, had you told Mr. Lutz that in your opinion he was suffering from arteriosclerosis? A. Yes, sir.

Q. In your opinion, Doctor, was Abe Lutz suffering from angina pectoris during the period between June 1, 1942 and November 1, 1942?

Mr. McGinley: That question, if your Honor please, is objected to upon the ground that there is no foundation laid, unless the witness is shown to have stated to the decedent that he was suffering from angina pectoris.

The Court: Let him answer the first question first; then ask him the second question.

Mr. Herndon: I think counsel has forgotten that the witness has already several times testified—

The Court: I thought he had.

Mr. McGinley: I will withdraw the objection, your Honor, [72] if I misquoted the witness.

(Testimony of Maurice H. Rosenfeld)

The Court: I don't think you misquoted him intentionally. You may answer the question.

A. May I have the question, sir?

(Question read by the reporter.)

A. Yes, sir.

Q. By Mr. Herndon: Have you an opinion, Doctor, as to whether or not the diseases of arteriosclerosis and angina pectoris contributed to the death of Abe Lutz?

A. Yes.

Q. What is your opinion?

Mr. McGinley: That is objected to, your Honor, upon the ground that it is immaterial.

The Court: Objection overruled.

A. The condition that was the actual cause of death was just a continuation of the process of angina pectoris.

Q. By Mr. Herndon: Would you answer my question as to whether or not in your opinion Mr. Lutz was suffering from arteriosclerosis and angina pectoris during the period from June 1, 1942 to November 1, 1942, if I had limited the period to November 1, 1942 and December 9, 1942?

Mr. McGinley: That is objected to, if your Honor please, on the ground that the question covers a period not covered by the examinations of this gentleman. He has not testified, as I recall the record, that he examined him in November of 1942, but that the last examination was August 11, [73] 1942, and therefore his opinion would be a matter of surmise and conjecture.

Mr. Herndon: I submit that is not correct, your Honor; this witness testified he attended the patient in his last illness, and he testified to a long series of examinations previously.

(Testimony of Maurice H. Rosenfeld)

The Court: I think the objection is rather to the weight to be given to the testimony than to its admissibility. But I am not sure that the question is very clear.

Mr. Herndon: I will withdraw it, because it is rather awkward and unintelligible.

Q. I will ask it this way: Whether you have an opinion as to whether Abe Lutz was suffering from arteriosclerosis and angina pectoris during the period between November 1, 1942 and December 9, 1942?

Mr. McGinley: That question, if your Honor please, is objected to on the additional ground that the opinion of this gentleman during the time mentioned would be wholly immaterial as far as the frame of mind of the decedent is concerned. I have assumed that this evidence is proper on the phase of the case showing knowledge. An independent opinion in the mind of Dr. Rosenfeld during the month of November, 1942, not communicated to the decedent, I submit respectfully would not tend to prove or disprove anything with regard to the mental frame or knowledge of the decedent during that period.

[74]

The Court: It may and it may not. I can't be sure. Of course, you can't put in all of your case at one time. Assume now that he says in his opinion, from November until December, he was suffering from arteriosclerosis and angina pectoris, and from December until the time of his last illness he was suffering from it also; that it just was progressively greater, and that when he came to see the man in his final illness he told him it was just the same old disease he had had right along, just getting progressively worse; after all, you can't do it all at one time. We may have to strike it out, but I think he is

(Testimony of Maurice H. Rosenfeld)

entitled to develop it. The objection is probably sound, yet I don't know how we are going to get at it any better. Let us have an answer to the question.

A. It is my belief that the patient had those conditions during those dates.

Q. By Mr. Herndon: Doctor, what is the significance of the eye changes which you referred to in your testimony this morning?

A. They are one of our best methods of diagnosing the process of arteriosclerosis.

Q. Can you tell us in layman's language what those eye changes are?

A. By means of a certain instrument a physician can examine the eyegrounds, where the arteries and veins are found, and there by direct vision an estimate as to the [75] degree of arteriosclerosis can be made, as well as with other changes in the retina, and a physician can definitely state the degree of arteriosclerosis in that patient.

Q. Did you find such evidence of eye changes in Abe Lutz? A. Yes, sir.

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to that upon the same ground last urged, unless that information was communicated to the patient.

The Court: I had understood this morning that he said he had, but let us develop it and find out; as I understand it, you diagnose a great many diseases, or are assisted in your diagnosis of a great many diseases by a diagnosis of the eye; that is particularly true on account of the little arteries in the sensitive part of the eye, and

(Testimony of Maurice H. Rosenfeld)

in arteriosclerosis these respond very quickly to the condition of arteriosclerosis, is that so?

A. Yes.

Q. Did you explain that to the patient at any time in 1937?

A. Your Honor, when he was first seen, I made a note, I believe, this morning, that he was seen by an eye specialist who had communicated to me the findings that he had discovered on the examination, and that information was conveyed to the patient, not only by me, but by the eye specialist. [76]

Q. He told you that, did he, in the course of his relation of his history—he told you what the eye specialist had told him?

A. No, sir, I had a direct communication to the eye specialist.

Q. By Mr. Herndon: To whom do you refer by the eye specialist?

Mr. McGinley: I move to strike the answer of the witness to the last question, in its entirety, pertaining to what he was told by the eye specialist, on the ground that it is hearsay.

The Court: That portion may be stricken referring to what the other doctor told him. The only thing you may relate here is what the patient told you had been told him by the other doctor.

A. The patient told me nothing about the findings.

Q. By Mr. Herndon: I think there is an unanswered question. I ask you, Doctor, whether you found evidence of eye changes in your examination of Mr. Lutz?

A. My own examination, following the examination by the eye specialist, was confirmatory of his findings.

(Testimony of Maurice H. Rosenfeld)

Q. I understand your answer to be that you did find evidence of eye changes? A. Yes, sir.

Q. Who was the specialist to whom you have just referred? [77] A. Dr. Stephen Seech.

Q. Doctor, what significance, if any, does the history of gas pains have in reference to the heart condition?

Mr. McGinley: I object, your Honor, upon the ground that there is no foundation.

The Court: Objection sustained.

Mr. Herndon: I am in this position, if your Honor please, a subsequent witness, as a matter of fact, the defendant and counterclaimant Harry Lutz, has testified in his deposition that his father suffered from gas pains and with that avowal I wonder if I might interrogate the witness on the subject matter, to be stricken if I do not connect it up?

The Court: Yes, you may, if you promise to connect it up, subject to a motion to strike. Of course, I don't think the form of the question is very fortunate. Re-frame it, please.

Q. By Mr. Herndon: In your opinion, Doctor, would a history of having gas pains related by Abe Lutz, have any significance in reference to your diagnosis of a heart condition?

Mr. McGinley: If your Honor please, may I urge the objection that there has been no foundation laid in that the witness has not testified, as I recall, that Mr. Abe Lutz complained of gas pains. I may be mistaken.

The Court: I think the objection is sound. Ask him [78] the question directly; it isn't leading, ask him if he complained to him of gas pains at any time.

(Testimony of Maurice H. Rosenfeld)

Q. By Mr. Herndon: At any of these consultations did the patient tell you that he had suffered gas pains?

A. He made mention of that complaint.

Q. What, Doctor, is the significance, if any, of complaints of gas pains, relating such complaints to your other findings and examinations of Mr. Lutz?

A. A gas pain is a general complaint of a patient. However, when it occurs on effort or on emotion, it becomes obvious that the stomach is not the thing at fault, but the heart. However, most patients who complain of pain or a peculiar sensation, that is hard for them to describe, and they usually say it is gas pains primarily because of belching, and they say, "I feel badly." This is a very common fallacy and the differential point is that gas pains usually are associated in close relation to the intake of food, where the gas pain as caused by heart disease is related to emotion and strain.

Q. Doctor, have you produced, pursuant to subpoena, records of your consultations with Mr. Lutz in January of 1937, June of 1942 and August of 1942?

A. Here are all my notes.

Mr. Herndon: I have shown counsel the notes which you have just handed me, comprising four pages, the first dated record being 1/16/37, and the last date being recorded [79] 5/10/44.

Q. I will ask you whether or not those notes were kept by you in the regular course of the practice of your profession? A. Yes, sir.

Q. When, Doctor, with reference to your consultations with Mr. Lutz, were these entries made?

A. The same day of his coming to the office.

(Testimony of Maurice H. Rosenfeld)

Q. I assume you make a practice of keeping case records of each of your patients? A. Each visit.

Q. Were all of the entries made on these four pages which you have just handed me made by you, or under your direction?

A. They were made by me to my secretary.

Q. Dictated by you? A. Dictated by me.

Q. You have since read them over? A. Yes, sir.

Q. You found them to be true and correct transcripts of your dictation? A. Yes, sir.

Mr. Herndon: I offer these in evidence, if your Honor please, as one exhibit, Plaintiff's next exhibit in order.

Mr. McGinley: If your Honor please, might I ask one or two questions for the purpose of ascertaining if these are [80] original records, to make sure?

The Court: Yes.

Q. By Mr. McGinley: Dr. Rosenfeld, will you state whether or not the typewritten sheets which counsel has just exhibited to you are those of your original records, or is that a series of documents which have just been recently prepared?

A. No, they are the original records, and only records, and they were dictated and typewritten the same day that the patient came to the office.

Q. Do you have, as part of your file, notes or memorandum in your handwriting, that are made at the time that you have the consultation with the patient?

A. As I consult with the patient I make notes on a pad, and from those notes I dictate to my secretary, or on the dictaphone.

(Testimony of Maurice H. Rosenfeld)

Q. Do you have with you the original notes or memoranda that you made at the time that you consulted with the patient?

A. They are destroyed after they are dictated.

Q. And the four sheets that have been exhibited to you, does that constitute all of the memoranda in your file reflecting consultations with Mr. Lutz? A. Yes, sir.

Mr. McGinley: That is all.

Mr. Herndon: The exhibit has been offered, your Honor. [81]

The Court: Are you making any objection to the admission?

Mr. McGinley: Just subject to the general grounds that I stated at the commencement of the testimony.

The Court: I think they are sufficiently broad to cover it, although counsel has not pointed it up. It is a fundamental principle of the law of evidence that a witness may examine memoranda in order to refresh his recollection in order to testify therefrom. You can't have two bites of a cherry; you can't have the witness testify, and also admit the notes. The notes may be admitted on cross examination by opposing counsel, but they may not be admitted by the person who produces them. The objection will be sustained. If there is anything in those notes you want to bring out do it by the regular process, but not by admitting the notes.

Mr. Herndon: I would be in full agreement with your Honor's ruling, except for the shop book and record rules.

The Court: That has nothing to do with these. This is only being used to refresh the witness' memory. That is an entirely different situation. If there is anything

(Testimony of Maurice H. Rosenfeld)

more you want to bring out by the testimony of this witness, you show them to him, and let him refresh his memory.

Mr. Herndon: I seriously doubt, your Honor, that there is anything additional. I probably would be carrying coals to Newcastle to offer them. [82]

The Court: You can't do it under the rules of evidence. It is perfectly manifest why you can't do it, because you can't have two bites of the cherry. You can't have the witness testify from the notes, and put the notes in evidence also. The only reason the notes are used in evidence is to refresh the memory of the witness. Opposing counsel can put them in if he wants to on cross examination.

Mr. Herndon: Let the record show, if your Honor please, that I am returning the notes to the doctor.

The Court: Yes.

Mr. Herndon: At this time, if your Honor please, I wish to offer in evidence Plaintiff's Exhibits 16, 17 and 18 for identification.

The Court: They may be received subject to the same objection heretofore made. They will be received in evidence now under the same numbers.

Q. By Mr. Herndon: Dr. Rosenfeld, as part of your records, you have handed to me a letter dated March 9, 1943 from the Northwestern National Life Insurance Company. Is that a part of your record file?

A. Yes, sir.

Mr. Herndon: May I show it to counsel, your Honor?

The Court: Yes.

Q. By Mr. Herndon: Doctor, referring to this letter on the letterhead of the Northwestern National Life In-

(Testimony of Maurice H. Rosenfeld)

surance Company, dated March 9, 1943, I will ask you whether or not [83] you received that letter?

A. I did.

Q. About what date?

A. I would have to see the letter, sir. Approximately March 9, 1943.

Q. Did you reply to that letter? A. I did.

Q. Do you have a copy of your reply?

A. No, sir.

Q. Do you know where it is? A. No, sir.

Q. Do you remember in substance what your reply was?

Mr. McGinley: That is objected to, if your Honor please, on the ground that it is not the best evidence; upon the further ground that it calls for hearsay testimony; on the additional ground that there has been no foundation laid establishing the identity of the purported writer, or the genuineness of the signature of the letter which counsel has exhibited to the witness.

The Court: Objection sustained.

Mr. Herndon: I will at this time offer the letter, if your Honor please, of March 9, 1943. May I hand it to the clerk?

Mr. McGinley: After your Honor has read the same may I make my objection?

The Court: Objection sustained. You can't prove it [84] that way.

Mr. Herndon: May it be marked for identification?

The Court: Yes, it may be marked for identification. Later the foundation may be laid, but at the present time it is not laid.

(Testimony of Maurice H. Rosenfeld)

Mr. Herndon: May I make an offer of proof, your Honor?

The Court: Yes.

Mr. Herndon: We offer to prove by this witness that in response to the letter which has just been marked for identification the witness replied and transmitted to the life insurance company a substantial report of his findings and the results of his examination of the patient, Abe Lutz, the purpose of it being to show, your Honor, that the witness, in reliance upon the authorizations, has disclosed the substance of the matters which are claimed to be privileged.

Q. By the Court: Did you ever, Doctor, have exhibited to you the signed written waiver of privilege by the deceased, Abe Lutz?

A. Before we give any information—I just don't keep all the waivers, as they usually amount to quite a few—we sometimes keep these waivers; sometimes we don't; but it is a general principle in my office that no information is given without a written waiver presented to me.

Q. You had a statement of some stranger to you apparently saying that he had such a waiver, but that does [85] not mean that the waiver was actually in existence, and that he had any such unless he showed the signed waiver to you of Abe Lutz. All he did was to say he had such thing, and ask you to reveal information on the strength of what he had? Did he show it to you?

A. These waivers are usually odd-sized pieces of paper that come in strips.

Q. He doesn't say in this letter he is sending it to you?

A. They usually, your Honor, send them along with the letter.

(Testimony of Maurice H. Rosenfeld)

Q. They don't say they ever had any such thing even. He says, "We are interested in having information concerning this, and we are authorized to write you for details in the following statement which appears over Mr. Lutz's signature in the application." He doesn't say he had a separate written waiver; all he says is that they had in their possession a waiver in an application; but that would not be sufficient if he did not exhibit it to you.

A. It is quite a time since that letter has been written, your Honor.

Q. You have no recollection whether you had anything additional from this letter?

A. Not specifically, sir.

The Court: The objection will be sustained.

Q. By Mr. Herndon: Doctor, since the death of Mr. Lutz [86] has any authorization for the full disclosure of information in your possession concerning Abe Lutz's medical history been presented to you?

Mr. McGinley: That question, if your Honor please, is objected to, first, on the ground that it calls for the opinion and conclusion of the witness; that it is asking this witness to interpret the interchange of correspondence; secondly, upon the ground that it is not the best evidence, and there has been no proper foundation laid which would show that the authorization was on behalf of the deceased, Abe Lutz.

The Court: The objection will be sustained. It must be clearly brought within the provision of law entitling a man to sign a waiver. If John Doe signs or produces a waiver, it would have no effect upon the privilege.

Mr. Herndon: That is all, your Honor.

(Short recess.)

(Testimony of Maurice H. Rosenfeld)

Cross-Examination

Q. By Mr. McGinley: If your Honor please, may I have the four sheets being the memoranda and notes of Dr. Rosenfeld, marked at this time for identification only?

The Court: Yes.

Mr. McGinley: I will hand them to the clerk.

The Clerk: As one exhibit, Defendants' A, your Honor.

The Court: Defendants' A for identification. [87]

Q. By Mr. McGinley: Dr. Rosenfeld, I believe the first time that Mr. Abe Lutz consulted you as a patient was on January 16, in the year 1937?

A. Yes, sir.

A. And that consultation took place at your office at 1908 Wilshire Boulevard, Los Angeles, Cal.?

A. Yes, sir.

Q. Will you recite again the complaints that were first made by Mr. Lutz?

A. Dizziness to the extent that he was unable to get up out of bed, I think about a week prior to his coming to the office.

Q. Following that statement you made a general clinical examination? A. Yes, sir.

Q. Having in mind his age, Doctor, which at that time was 64, other than the finding that you made with respect to the condition which you have described, was his condition normal? A. No, sir.

Q. It was? A. It was not.

Q. In what respect was it not normal?

A. His eyeground findings, on examination of the eyes, by means of an ophthalmoscope; there were certain abnormalities found in the eyeground. [88]

(Testimony of Maurice H. Rosenfeld)

Q. On January 16, 1937, did you state to Mr. Lutz, "I have found an abnormality with reference to your eyes"? A. I did not, sir.

Q. As nearly as you can, Doctor, and in your own words, detached from what you knew professionally concerning his condition, what were your exact words to Mr. Lutz on January 16, 1937?

A. It is rather difficult, sir, to remember after all these years the exact words.

Q. In substance?

The Court: In substance, as nearly as you can remember, just what did you say? You may, Mr. Clerk, give the doctor his notes. He is entitled to have them if he wants to refresh his memory for any purpose.

A. The report was that his general condition was satisfactory. However, the question of a possible stroke had to be considered in view of the symptoms and the eye ground findings.

The Court: That is what you told him?

A. Yes, sir.

Q. By Mr. McGinley: You told Mr. Lutz that his condition was satisfactory with the exception of the stroke? A. Yes, sir.

Q. Doctor, did you mention the word "stroke" to Mr. Lutz?

A. Probably not in exactly those words, sir. [89]

Q. As nearly as you can what did you tell Mr. Lutz, if you did not use the word "stroke"?

A. It probably would have been that he had a slight injury to his brain, or there was a small spasm of the blood vessel in his brain.

(Testimony of Maurice H. Rosenfeld)

Q. You did not also tell him that you found a condition which you could, by prescribing treatment, take care of? A. Yes.

Q. And what did Mr. Lutz say in response to that?

A. I don't recall the exact words, but he apparently thought he would follow the suggestion, and that's the last I heard of him after that examination for a number of years.

Q. It is your policy, is it not, Doctor, when you find a condition involving a suspicion of heart infirmity not to make any statements which would make the patient unduly apprehensive? A. That is correct.

Q. And that was your attitude toward Mr. Lutz in January of 1937? A. Yes, sir.

Q. Nitroglycerine is prescribed for calming down the nerves, is it not, Doctor? A. No, sir.

Q. It is prescribed for high blood pressure?

A. Sometimes. [90]

Q. On your examination in January, 1937, did you find any evidence of Mr. Lutz being a potential diabetic?

A. No, sir.

Q. That occurred at a later examination?

A. Yes, sir.

Q. How many months elapsed before you saw Mr. Lutz again?

A. He was first seen January 16, 1937; then he reported back several days later, January 19, 1937, and the treatment was discussed. That was the subsequent discussion following the preexamination. I did not see Mr. Lutz until June 1, 1942.

(Testimony of Maurice H. Rosenfeld)

Q. Between January, 1937 and June, 1942, did you have occasion to talk to Mr. Lutz over the phone relative to the treatment you had prescribed?

A. Do you have reference to the treatment of 1937?

Q. Yes. A. I don't believe so.

Q. What was the first date in June, 1942, that you again consulted with Mr. Lutz?

A. He was in my office June 1, 1942.

Q. I believe you testified that he complained at that time of pain in the heart region, is that right?

A. Yes, sir.

Q. What were his exact words, or the substance of his statement? You can refresh your memory from your notes. [91]

A. His general complaint was of pain, and he pointed to his heart region. At that time he would describe it, "These are gas pains" or "I have a pain in this region," and he would point to his heart region.

Q. Did he not tell you on that occasion, Doctor, that he had these gas pains following his meals and on arising in the morning? A. He may have.

Q. When you had made the examination that you have previously testified to, during the month of June, 1942, your suspicions were that he had mild angina pectoris, is that correct? A. Yes, sir.

Q. And in coming to that opinion you attributed significance to the complaint of the patient that he suffered from gas pains? A. Yes, sir.

Q. During the month of June, 1942, the symptoms were not sufficiently strong enough, were they, Doctor, to enable you to say definitely that Mr. Lutz had angina pectoris? A. They were very mild.

(Testimony of Maurice H. Rosenfeld)

Q. And what treatment did you prescribe for that mild condition that you found to exist in June, 1942?

A. Restriction of activity, avoidance of severe exertion, and the administration of nitroglycerine for the relief of pain. [92]

Q. Your diagnoses at that time were still tentative, were they not, Doctor? A. Yes, sir.

Q. I believe the next time you saw Mr. Lutz was on June 5, 1942, is that correct? A. June 5.

Q. June 5, 1942? A. Yes, sir.

Q. Did you make an examination on that date?

A. No, sir.

Q. You made an examination on June 12, 1942?

A. Yes.

Q. On June 12, 1942 Mr. Lutz told you that he had been feeling better than he had on the previous visits, did he not? A. Yes, sir.

Q. And in your opinion, Doctor, did you attribute that condition to the relief the patient was obtaining from nitroglycerine?

A. No, sir, I believe it was due to the restriction of activity.

Q. On June 12, 1942, when he told you that he was feeling better, he did not complain of pain, did he?

A. No, sir.

Q. He did not complain about any pressure in the chest? A. No, sir.

Q. He did not complain, Doctor, about any dizziness [93] that he had previously complained of during the month of January, 1937? A. He did not.

Q. He did not complain of palpitation of the heart?

A. No, sir.

(Testimony of Maurice H. Rosenfeld)

Q. Now, the next time he saw you was on July 6, 1942, is that correct?

A. No, sir, it was June 12, 1942.

Q. June 12, 1942? I probably misstated, Doctor, the date. I meant to say June 12, 1942, when I was interrogating you about the conversation. I probably said June 12th. Did that confuse you in any respect?

A. I inferred that you were speaking of June 5.

Q. Then I will clarify it. You saw him on June 12, 1942? A. Yes, sir.

Q. And it was on that occasion that he told you that he had been feeling better? A. Yes, sir.

Q. Without repeating the three or four questions I asked you with reference to the complaint, it was on that occasion that he did not complain about any palpitation of the heart or pressure in the chest or pains in the heart?

A. That's right.

Q. I want to go directly to the next occasion when you consulted with Mr. Lutz. [94]

A. That was July 8.

Q. Was it July 8 or July 6?

A. July 6; pardon me.

Q. When he appeared on that occasion, isn't it also true that he told you he was very much improved?

A. Yes, sir.

Q. He did not complain on that occasion of having palpitation of the heart, did he? A. Yes, he did not.

Q. And he did not complain of dizziness or pressure in the chest, or pain in the heart?

A. Occasional pain in the heart.

(Testimony of Maurice H. Rosenfeld)

Q. I believe that you had previously testified on direct examination that the symptoms had disappeared, is that correct?

A. Not completely: they had not completely disappeared. They were very much improved, and by that I wish to clarify that when I say the patient was better, I do not wish to infer that the symptoms had completely disappeared, but their frequency is greatly diminished, and the severity of the pain is less.

Q. Can you, from your notes, Doctor, tell us exactly, or in substance, what you stated to Mr. Lutz on July 6, 1942?

A. On that day I advised him to take a little vacation. He had been working hard. I suggested to him that these pains, the recurrence of them, particularly on emotion and [95] on overwork, were primarily due to the heart, and that the series of electrocardiograms that were taken suggested too that these pains were due to the heart, since they were different than the one taken a number of years prior.

Q. Will you refer to your notes and read the portion of your notes that refreshes your memory on the statement that you just made?

A. On July 6 the electrocardiograms show definite improvement over the previous one, particularly in Lead 4. I think he ought to go away for a little vacation. It is possible that he had a slight coronary occlusion. When he comes back I want to check the blood sugar and urine.

Q. Does that refresh your memory, Doctor, that you told Mr. Lutz that your interpretation of the electrocardiogram which was last taken showed an improvement? A. Yes.

(Testimony of Maurice H. Rosenfeld)

Q. You told Mr. Lutz that? A. Yes, sir.

Q. The next consultation you have is on August 7, 1942? A. Yes, sir.

Q. He had no complaints on that occasion, did he, Doctor? A. He did not.

Q. He did not complain of palpitation of the heart?

A. No, sir.

Q. Dizziness? [96] A. No, sir.

Q. Pressure in the chest? A. Not on that visit.

Q. Or of pain in the heart? A. That's right.

Q. You made a blood sugar test and found it to be normal on that occasion? A. Yes, sir.

Q. In that blood sugar test you conveyed your interpretation of the fact that it was normal, to Mr. Lutz?

A. Yes, sir.

Q. And told him his blood sugar was normal?

A. Yes, sir.

Q. On August 7, 1942, having in mind the age of Mr. Lutz, to-wit, 64 years of age, is it your opinion that he was in a good state of health?

A. All except for the pains and slight electrocardiograph changes.

Q. And in so far as the patient was concerned, there were no subjective complaints which indicated to you that there was any infirmity in his heart?

A. On what date, sir?

Q. On August 7, 1942.

A. He had no pains on that particular visit.

Q. The next visit or consultation with Mr. Lutz, I believe, was on August 11, 1942? [97]

A. Yes, sir.

(Testimony of Maurice H. Rosenfeld)

Q. He had no pain on that date, did he?

A. He had, because I note in my chart here that he was told to continue taking nitroglycerine p.r.n., meaning whenever necessary; so if he had had no pain I would not have made this notation to take nitroglycerine, but in view of the fact that there is this notation here it means he may have had, not particularly on the day of the examination, but he had—in the occurrence of a week or a month, some pains, and hence the nitroglycerine was given.

Q. I understood you to testify, on direct examination, Doctor, that in your consultation with Abe Lutz on August 11, 1942, that the patient had no complaints. Is there anything in your notes with reference to August 11, 1942 which sets forth any complaints of the patient?

A. In trying to make a resume of a whole month, or over several years of watching a patient, it is very difficult to put down every single word that occurs, but there are certain notations which the physician has to find out, which will help out merely in looking over the record, and so, on this nitroglycerine, we don't put down exactly the date he has a pain, or every pain he may have, but generally the over-all picture was that the patient was improving, because of his curtailment of activity, and he was taking nitroglycerine on occasions whenever necessary; but he might not have said he had a pain that day; he might not have one for a [98] week; but the general over-all picture was he was better, but pains did occur, and when they did occur he was advised to take nitroglycerine.

Q. In your opinion, Doctor, is this a fair statement concerning the health and condition of Abe Lutz from June 5, 1942 to August 11, 1942, that he had improved?

A. Yes.

(Testimony of Maurice H. Rosenfeld)

Q. You do know, do you not, that when the patient came to see you in January, 1937, that he had complained of pain? I hand you your notes. You may refresh your memory, Doctor. A. On what date?

Q. January 16, 1937.

A. He had no pain in 1937.

Q. When was the first date that you have a record of complaint of pain from the patient?

A. I have a note on June 1, 1942, where the patient complained that lately he has been getting pains around his heart.

Q. Will you read into the record just the expression that you have in your notes there with regard to the complaint of pain?

A. The exact wording is: "Lately he has been complaining of precordial pain."

Q. Your use of the word "precordial", that is something that originated with you; not with the patient?

A. That's right. [99]

Q. To clarify it, he didn't say, "I have a precordial pain"? A. No, sir.

Q. Referring to your notes of August 11, 1942, will you please state whether you found any similar memorial of complaint by the patient of pain, and if you did, will you read it into the record?

A. In 1942 I have no notes to that effect.

Q. And in giving the testimony you have given here today you have refreshed your memory by consulting your office notes, which were made at or about the time of the visits they purport to refer to?

A. I refreshed my memory only from these notes, because they are all I have.

(Testimony of Maurice H. Rosenfeld)

Q. Between August 11, 1942 and the last illness of Mr. Lutz, which was in May, 1944, did you see Abe Lutz? A. No, sir.

Q. What did you say?

A. I did not see him until April 7, 1944.

Q. You did not see Mr. Lutz between August 11, 1942 and April 7, 1944? A. That's correct.

Q. You have given as your opinion that Mr. Lutz had an attack of coronary thrombosis, Doctor, immediately preceding his death? A. Yes, sir. [100]

Q. Will you state the distinction between angina pectoris and coronary thrombosis, insofar as the symptoms are concerned?

A. In coronary thrombosis the pain is very intense and persistent. It may occur at any time, regardless of effort or emotion, as compared with angina pectoris, which occurs usually on emotion, and after exertion, and it is of short duration, and it usually does not assume the severity of the pain of an acute coronary thrombosis.

Q. Having in mind that the record shows, I believe, that Mr. Lutz died May 28, 1944, when did he have the attack of acute coronary thrombosis?

A. Probably several hours before his death.

Q. Doctor, it was not possible in August, 1942, from any examination that you could make as a heart specialist, to determine whether or not Mr. Lutz had coronary thrombosis, was it? A. I could not determine that.

Q. Doctor, is it not a fact that normal, healthy appearing people suffer from fatal attacks of coronary thrombosis without any previous symptoms of the attack?

A. Yes, sir.

(Testimony of Maurice H. Rosenfeld)

Q. And in any of the examinations that you made, from the first time that Mr. Lutz became your patient up until he had the fatal attack in May, 1944, there were no symptoms, subjective and objective, which you could ascribe to coronary [101] thrombosis?

A. That's true.

Q. From August 11, 1942 to April, 1944, did you prescribe any medicine for Mr. Lutz?

A. No, I did not.

Q. I understood you to testify you did not see him during that time? A. That's correct.

Q. Now, the last time that you saw Mr. Lutz before his fatal illness was on October 11, 1942, is that right?

A. I saw him in my office on April 7, 1944.

Q. 1944? A. Yes, sir.

Q. The last time you saw the decedent before November 16, 1942, which is the date of the application for insurance in this case, was on August 11, 1942, is that correct? A. That is correct.

Q. Will you describe to the court the appearance of Mr. Lutz, in so far as appearance can convey to a doctor his condition of health with reference to color, and so forth?

A. He was a normal appearing man in every way.

Q. And you found, did you not, Doctor, having in mind that he was 64 years of age, that his blood pressure was normal? A. Yes.

Q. Did Mr. Lutz indicate to you on August 11, 1942, [102] by any statement that he made, apprehension about the consultations he had had with you?

Mr. Herndon: That question is objected to as calling for a conclusion of the witness, and an opinion not with respect to any subject of expert testimony.

(Testimony of Maurice H. Rosenfeld)

The Court: Read the question, please.

(Question read by the reporter.)

The Court: I don't think it is very clear.

Mr. McGinley: May I withdraw the question, your Honor?

The Court: Yes.

Q. By Mr. McGinley: What was Mr. Lutz's weight on August 11, 1942?

A. I do not have the weight on that day. I have the weight of the previous month.

Q. What was that, Doctor, please?

A. 183½ pounds.

Q. Prior to August 11, 1942, had you found that there was sugar or albumen in the urine?

A. I found he had on one occasion excessive sugar in the blood.

Q. Doctor, can you refer to your notes and tell us the date when you made that finding?

A. June 3, 1942.

Q. And when you saw him on August 11, 1942, I believe you have testified that that condition had been corrected, and his blood sugar was normal? [103]

A. That is correct.

Q. During the month—

Mr. McGinley: If your Honor please, some of the questions I am now about to ask might not be properly cross examination, but inasmuch as I know the doctor is very busy, I was wondering if I could ask these questions so that the doctor would not have to come back again.

The Court: Yes, you can make him your own witness, and ask any questions you want to. I am not a

(Testimony of Maurice H. Rosenfeld)

stickler, when I have no objection, about that, particularly with medical testimony, particularly where the doctors are busy. Make him your own witness, and ask him the question direct.

Q. By Mr. McGinley: During the months of November and December, 1942, and January of 1943, what was the address of your office?

A. 1908 Wilshire Boulevard.

Q. During that period of time what was your telephone number? A. Exposition 1369.

Q. During that period of time what was the name of your medical nurse? A. Mrs. Moore.

Q. During that period of time did you have in your employ a nurse by the name of Miss Byington?

A. She is a bookkeeper.

Q. Was she your bookkeeper during that period of time? [104]

A. I think she has been in my employ probably about two and a half to three years.

Q. Do you know Mr. Harold Morgan, of the firm of Hayes & Bradstreet, Doctor?

A. I do not know Mr. Morgan.

Q. Did Mr. Morgan, during the months of November and December, 1942, and January, 1943, communicate with you, either orally or by written communication, relative to the health and condition of Abe Lutz, the decedent?

Mr. Herndon: I object to that upon the ground that it is wholly irrelevant and immaterial to any issue in this case and no foundation laid.

The Court: No foundation has been laid, unless you indicate how you are going to connect it up.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: I intend to connect it up, your Honor. I have taken the deposition of Mr. Morgan, and I have also subpoenaed him, and will show that he was the local agent, employed by Hayes & Bradstreet, who are general agents for the plaintiff in this case.

The Court: Very well, we will take it subject to a motion to strike in the event it is not properly connected up, or otherwise inadmissible, in order that the doctor will not have to come back. You may answer.

A. I don't recall any conversation with Mr. Morgan.

Q. By Mr. McGinley: Does your file reflect any written communications with Mr. Morgan during that period? [105] A. No, sir.

Q. Did you, during that period of time, or at any time up until the present time, receive any communications from Hayes & Bradstreet, Los Angeles, California, with reference to the health and condition of Abe Lutz?

Mr. Herndon: May it be stipulated, your Honor, that the same objection goes to all this line of questions, and the same ruling, subject to a motion to strike, in order to save time?

The Court: Yes.

Mr. McGinley: So stipulated.

A. I don't recall. It is possible, because of the time element, and because I have no recollection in my notes of any such conversation.

Q. Your notes do not show any such conversation as that? A. That's right.

Q. And your file doesn't disclose any written communication? A. That's right.

Q. During that same period of time, Doctor, did you receive any letters or communications from the New England Mutual Life Insurance of Boston, the plaintiff

(Testimony of Maurice H. Rosenfeld)

in this action, with reference to the health, condition and treatment you prescribed for Mr. Abe Lutz?

A. I don't recall any.

Q. Will you kindly examine your file, and if there are [106] any copies of any communications, will you please produce them?

A. I don't have any communication, sir.

Q. When, for the first time, did the New England Mutual Life Insurance Company of Boston communicate with you with reference to your testimony in this case?

A. I received a form to fill out shortly after the death of Mr. Lutz.

Q. Will you refresh your memory from your files, and give us the approximate time when you received that communication from the New England Mutual Life Insurance Company of Boston?

A. The exact date has not been completed on this sheet, but I know it was subsequent to his death.

Q. That would be subsequent to May 28, 1944?

A. Correct.

Q. Prior to that time I understand there were no communications from the New England Mutual Life Insurance Company with reference to the health and condition of Abe Lutz, or any treatment that you had prescribed for him? A. That's right, sir.

Mr. McGinley: If your Honor please, I have a document which I desire to have marked for identification, and I would like to make this explanation: The original has been brought forth in a deposition, but I have taken the liberty, because of the smallness of the print, in having it blown up [107] to twice its normal size.

The Court: It may be marked for identification as Defendants' next in order.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: I have shown it to counsel.

The Clerk: Defendants' Exhibit B.

Q. By Mr. McGinley: Dr. Rosenfeld, I hand you a document which has been marked for identification as Defendants' Exhibit B, and ask you to examine that document and state whether or not any of the writing in ink is in your handwriting? A. It is not.

Q. Will you please state whether you, at any time, saw the original of Defendants' Exhibit B?

A. No, sir.

Q. Doctor, it was not until the year 1944 that you were able to give a professional opinion of definite angina pectoris as distinguished from the tentative diagnosis of angina pectoris?

A. No, the diagnosis was confirmed by the history as well as the changes in the electrocardiogram, and which were minor but definitely confirmatory.

Q. Is it possible, Doctor, for a person to have mild angina and have a complete recovery? A. Yes.

Q. Many times a person will have all of the symptoms of mild angina pectoris, and over a period of time and [108] treatment, can completely recover, is that right?

A. That's true.

Q. When you diagnosed tentatively Mr. Lutz's condition as angina pectoris, during the year 1942, in definitely coming to the conclusion that he had angina pectoris did you ascribe some significance to the fact that he had died of coronary thrombosis?

A. It was my impression that one is frequently the forerunner of the other.

(Testimony of Maurice H. Rosenfeld)

Q. And when Mr. Lutz died from coronary thrombosis the previous tentative diagnosis that you had arrived at you changed to a definite diagnosis of angina pectoris?

A. Not exactly. The diagnosis of angina pectoris was established in my mind, that he had definitely that, and then he developed something, which with the history confirmed the diagnosis, while theretofore it was just narrowed.

Q. On August 11, 1942, in view of the then condition of health of Mr. Abe Lutz, you had not abandoned the thought that he would have a complete recovery, had you?

A. He was recovered from the pain, but whether a patient is recovered from a disease can only be taken when in exercising themselves, and having the same excitement, the same excessive weight he had before, the symptoms would never have reoccurred; then we have a right to assume that there is a recovery. However, when the patient has improved by way of cutting down his activities and his [109] emotions, and his weight, we cannot assume that the disease is cured, but that it is not aggravated.

Q. With reference to Mr. Lutz, he had cut down his weight and reduced his activity, had he not, under your treatment? A. Yes.

Q. And that was the condition that you found him in in August, 1942? A. That's right.

Mr. McGinley: May I show this document to counsel, your Honor? If your Honor please, may this document, being a certified copy of the local death record, be marked for identification?

The Court: It may be so marked.

The Clerk: Defendants' Exhibit C.

(Testimony of Maurice H. Rosenfeld)

Q. By Mr. McGinley: Dr. Rosenfeld, do you recall the occasion of your signing the medical death certificate following the death of Mr. Lutz? A. I do.

Q. Where—I mean with regard to the place, did you sign the document?

A. I don't recall whether that was in my office or at the Cedars of Lebanon Hospital. I believe, however, it may have been in my office.

Q. And at the time that you signed the death certificate you had your file in front of you? [110]

A. That I don't recall.

Q. Do you recall the period or duration that you noted for the angina pectoris at the time that you signed the death certificate? A. I don't recall it at present.

Q. Doctor, I am handing you a certified copy of the certificate of death which has been marked for identification as Defendants' Exhibit C, and will you examine the same and state whether or not the information in writing underneath the caption: Medical certificate, is in your handwriting? A. Yes, sir.

Q. And does the designation, M. H. Rosenfeld, show your signature? A. Yes, sir.

Q. After examining the document, what is your memory as to whether or not this document was filled out at the time that you had your file before you in your office at 1908 Wilshire Boulevard?

A. I don't recall the file being near me when this was filled out.

Q. Do you recall filling out the certificate at any other place? A. No, sir.

Q. What would your best recollection be, that you filled it out at your office?

A. I believe that would be the probability. [111]

(Testimony of Maurice H. Rosenfeld)

Q. Referring to the document, Defendants' Exhibit C for identification, what was the date that you filled out the medical certificate? A. That was May 29, 1944.

Mr. McGinley: At this time, if your Honor please, I offer in evidence for the purpose of impeachment the certified copy of the death certificate which has heretofore been marked for identification as Defendants' Exhibit C.

The Court: Are you back on cross examination again, or are you on direct examination still?

Mr. McGinley: I intended to offer it on cross examination and it was at the foot of my notes, so I want to apologize for having included it with my direct examination without calling it to your attention.

The Court: It may be considered that this question about the death certificate is on cross examination. It may be received.

Mr. Herndon: I have no objection whatever to the offered instrument, but I do object to it if it is offered for impeachment purposes.

The Court: It does not make an difference what it is offered for; it will speak for itself.

Mr. McGinley: If your Honor please, I have concluded with both my cross examination and the direct examination of Dr. Rosenfeld, but may I inquire if the record is clear that in interrogating the doctor I am being consistent with [112] having objected to the doctor testifying under the grounds that I have previously noted.

The Court: Other than the portion of the testimony which is brought out in direct, and also that portion of the cross examination which was designed to impeach, you can't protect yourself on that, because that has not anything to do with the falsity or truth of the statements.

(Testimony of Maurice H. Rosenfeld)

Mr. McGinley: With that understanding I have concluded.

The Court: Any redirect examination?

Re-Direct Examination

Q. By Mr. Herndon: Doctor, when you stated in your testimony on cross examination that in consultations with Mr. Lutz subsequent to June 1, 1942 you found improvement, did you mean improvement of the underlying conditions, or did you mean alleviation or reduction of the symptoms? A. I meant the alleviation of symptoms.

Q. On your cross examination you used the term "precordial" pains. What does "precordial pain" mean?

A. It means pain around the heart region.

Mr. McGinley: Defendants' Exhibit A for identification has been referred to in cross examination, and therefore, if your Honor please, I should like to offer it as plaintiff's next exhibit, inasmuch as it illustrates and is connected to the matters covered on cross examination.

Mr. McGinley: May I inquire—

The Court: These are the doctor's notes. Do you want to introduce the notes? [113]

Mr. McGinley: No, your Honor, and I object to their admission on the ground that there is no foundation; that they are self-serving, and that the witness has testified orally to the matters, that his memory has been refreshed by this memorandum, and therefore it would be immaterial.

The Court: Yes, I think that he refreshed his memory by reference to the notes on cross examination, just as he had done before. They are marked for identification, and will remain here, of course, but I think it would just

(Testimony of Maurice H. Rosenfeld)

clutter up the record, and make that much more expense in connection with the record.

Mr. Herndon: We have no further questions of the doctor.

Mr. McGinley: May the doctor be excused?

The Witness: Your Honor, may I clarify one point?

The Court: Certainly.

The Witness: In the death certificate there are two questions, and so there will be no confusion, it says the duration of the coronary thrombosis, and the duration for angina pectoris. When these certificates are made out, and when the record is not at hand, for statistical purposes, where we want to give the duration, instead of saying it was 13 months or 16 months, we put down a year plus, meaning that it was more than a year, so it is not particularly binding, just as if you put down three days, or something like that.

The Court: These are for statistical purposes? [114]

A. That's right.

The Court: You mean by that that it had continued for more than one year, without committing yourself to whether it was ten or five or three? A. Yes.

Mr. McGinley: I might ask one question on that, Doctor: When you filled out the death certificate in May, 1944, is it not a fact that you would have specified the duration of angina pectoris as being two-plus, if there had been any symptoms prior to two years preceding May 29, 1944?

A. It would probably have been better if I had the exact date of his first visit.

Mr. McGinley: That is all. [115]

STEPHEN G. SEECH

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Stephen G. Seech.

Direct Examination

Q. By Mr. Herndon: What is your business or profession?

A. Physician and surgeon, specializing in ophthalmology.

Q. Are you licensed to practice your profession in the State of California? A. I am.

Q. For how long have you been engaged in practice in California? A. 20 years.

Q. Do you specialize in ophthalmology? [34]

A. Yes.

Q. What is ophthalmology?

A. The study of the eye.

Q. Where do you maintain your office?

A. 2007 Wilshire Boulevard.

Q. Did you know Abe Lutz in his lifetime?

A. I did.

Q. Were you ever consulted by him in your professional capacity? A. I was.

Q. When? A. On January 15, 1937.

Q. That was the date of the first consultation?

A. That's right.

Q. Mr. Lutz came to your office on that date?

A. He did.

Q. Did he at that time recite to you any complaints?

The Witness: Your Honor, being confidential information, may I reveal the facts given to me by him?

(Testimony of Stephen G. Seech)

Mr. McGinley: If your Honor please, to expedite the matter, may I inquire if counsel will be willing to enter into the same stipulation with regard to the testimony of the doctor is about to give as was had with reference to the testimony of Dr. Rosenfeld?

The Court: Subject to a motion to strike?

Mr. Herndon: Yes, we will so stipulate. [35]

The Court: The stipulation will be received. You may reveal the information, with that stipulation, Doctor.

A. He gave me information that two days ago he awakened with a dizzy head; he was nauseated. He had no difficulty in vision. He got his last glasses a few years before.

Q. By Mr. Herndon: What you have just stated, Doctor, constitutes the substance of what Mr. Lutz told you on January 15, 1937? A. Yes.

Q. Did you thereafter make an examination of Mr Lutz? A. I did.

Q. Of what did that examination consist?

A. The examination consisted of an examination of both of his eyes.

Q. Did you use an ophthalmoscope? A. I did.

Q. What was your diagnosis?

A. I have the information, what I found. I did not make any diagnosis; just put down my findings.

Q. What then were your findings?

A. Both pupils round, equal, reacted well; the media are clear; his fundi, both discs are well defined of normal color; in the fundus, several very tortuous vessels were seen, and a few punctate hemorrhages. The left fundus were normal. [36]

(Testimony of Stephen G. Seech)

Q. Based upon your examination and the complaints related by the patient, did you form any opinion as to whether the patient was suffering from any disease?

A. No.

Mr. McGinley: If your Honor please, in addition to the objection which counsel has made, the defendant objects to this question upon the ground that there is no foundation laid which would make it competent, if there is no showing that the doctor told the decedent, the patient—

The Court: Having said he had no opinion, it is not material.

Mr. McGinley: I did not hear that, your Honor.

The Court: He said no.

Q. By Mr. Herndon: Doctor, you have in your hand the notes that you have referred to, a card or a paper?

A. That's right.

Q. Will you state what that is?

A. That is my record.

Q. Did you make that record at the time of the consultation with the patient? A. I did.

Q. Did you record thereon the substance of the history and the conclusions reached by you?

A. I did record everything in my own handwriting.

Mr. Herndon: Your Honor, may I ask the witness to permit me to examine the notes? [37]

The Court: Yes, and let counsel for the other side see them also.

Q. By Mr. Herndon: Did you prescribe any treatment, Doctor, in this case?

A. I can't remember without the card. That was eight years ago.

(Testimony of Stephen G. Seech)

Q. Doctor, what significance, if any, did you give to the finding of punctate hemorrhage?

A. Your Honor, I was called upon to testify only upon facts; not to give an opinion. Do I have to answer that question?

The Court: In other words, you mean you were not called here as an expert? A. That's right.

The Court: You were called here only to testify to certain facts?

Mr. Herndon: I might state, your Honor, it is my understanding when the doctor was subpoenaed the question was raised concerning his compensation to which the reply was made, at my suggestion, that we would pay the doctor any reasonable charge for his time. If that enters into the doctor's unwillingness to express an opinion, for whatever it is worth, I now state in this case, as in all cases, we expect to pay a reasonable fee. I think that ethics permit us to do that, and that good morals and fair dealing require us to do that, and no more, no less. That is our [38] position with respect to that phase of it.

Mr. McGinley: If your Honor please, I wish to object on behalf of the defendants, that the opinion of the doctor on the matter included in the question would be immaterial to any of the issues; would be hearsay, as far as Harry Lutz, the beneficiary, is concerned, and there is no foundation laid that the opinion he is about to express was communicated to the deceased, which I assume would be for the purpose of showing knowledge.

The Court: I think the objection is sound.

(Discussion.)

The Court: I will take it subject to a motion to strike, only on the promise of counsel that he will properly connect it up so as to make it applicable to the decedent's

(Testimony of Stephen G. Seech)

death; otherwise, in my judgment it is not admissible. You may answer with that understanding.

The Witness: Your Honor, I was told they don't want any opinion from me; only the facts on my card. I did not study the card; I cannot give any opinion, unless your Honor wishes me to do so.

The Court: I can't make you have an opinion and give it, if you don't have an opinion.

Mr. Herndon: Your Honor, he stated that he had an opinion.

The Court: Did you have an opinion at that time, or is it your opinion now? [39]

A. That was 1937. Today is 1945. I do not recall what opinion I had at that time, because—

The Court: You don't need to interrogate any further, because the doctor says he can't remember what opinion he did have, so that is (period).

A. I can give only a hypothetical question.

The Court: You aren't being asked for that.

Mr. Herndon: I understand the testimony of the witness to be that he had an opinion, but he does not now recall what it was.

The Court: That is my understanding.

Q. By Mr. Herndon: Is that correct, Doctor?

A. I said that I had an opinion if we find something in the eye, but I don't recall, in 1937, what opinion I had about the patient.

Q. Would you be able, by referring to your notes, to refresh your recollection?

A. May I look at them, please? The patient, 58 years of age, came in and I found in one eye a few hemorrhages; those hemorrhages can indicate several condi-

(Testimony of Stephen G. Seech)

tions. It can indicate increased pressure of the arteries; it can indicate diabetes; it can indicate diseases of the blood system.

Q. What diseases of the blood system?

A. Pernicious anemia; leukoma.

Q. Arteriosclerosis?

A. Arteriosclerosis; that is, hardening of the arteries.

[40]

Q. Retinal sclerosis? A. Yes, sir.

Q. Do you have an opinion at this time as to whether or not your findings indicated in Abe Lutz arteriosclerosis or retinal sclerosis?

The Court: That question is not clear. As I interpret the question, it is, do you now know whether he then had that opinion, is that right?

Mr. Herndon: Yes, your Honor.

A. According to my findings that condition cleared up in his eye, on my examination of October, 1937. I do not recall whether I referred him to a medical doctor, but we always recommend the patient, when we find hemorrhages, to consult a medical man to find the cause of that condition in the eye.

Q. Do you recall what, if anything, you told Mr. Lutz with reference to your findings?

A. I do not recall what I told him, but we always tell the same thing to the patient that we found something wrong in the eye, and that a medical examination should be made to find the cause of that disturbance.

Q. When next, after January 15, 1937, did you see Mr. Lutz? A. February 1.

Q. Of the same year? A. Of the same year. [41]

(Testimony of Stephen G. Seech)

Q. What history, if any, did the patient give you on the date of your second consultation?

A. No history is recorded, except on findings.

Q. Did you make an examination on that day?

A. I did.

Q. Of what did that examination consist?

A. It showed that the right fundus showed only a punctate hemorrhage.

Q. When next after February 1, 1937, did you see Mr. Lutz? A. October 11.

Q. 1937? A. 1937.

Q. On that date did the patient, Mr. Lutz, give you any history or complaints? A. No, no complaints.

Q. Did you make an examination?

A. I did make an examination.

Q. Of what did that examination consist?

A. The examination showed that the hemorrhages cleared up.

Q. When next did you see Mr. Lutz?

A. May 21, 1938.

Q. May 21 or 31? A. May 21, 1938.

Q. On that occasion did the patient register any [42] complaints? A. He was complaining of dizziness.

Q. Did you make an examination on that occasion?

A. I did.

Q. Of what did that examination consist?

A. The eye grounds were normal; the tension in both eyes was 15, which was normal vision in each eye; with glasses it was 20/20. My study of the visual field would show normal limits; no enlargements of the blind spot; no scotoma; the color perception was normal.

(Testimony of Stephen G. Seech)

The Court: In other words, so far as dizziness was concerned, the finding was negative?

A. That was my finding.

Q. By Mr. Herndon: You mean to say, Doctor, that the objective findings were negative?

A. May 21, 1938, the examination was negative.

Q. Did you make any diagnosis on that consultation, or after your examination on May 21, 1938?

A. We just recorded that the findings were negative. I did not find anything wrong with his eyes.

Q. May I see the prescriptions? May I show the witness Plaintiff's Exhibits 5 and 6. I now show you, Doctor, two prescriptions, bearing designations Plaintiff's Exhibits 5 and 6, and will ask you whether or not you have previously seen those prescriptions? A. I did.
[43]

Q. Those prescriptions were given and written by you, were they? A. They were.

Q. Referring to Plaintiff's Exhibit No. 5, I note that there is written thereon: Tablets of pheno barbital, is that correct? A. Correct.

Q. What is the purpose of that medicine? What function does it serve?

A. To quiet the apprehension of the patient.

Q. On each of your examinations of Mr. Lutz, to which you have testified, did you take his blood pressure?

A. I did not.

A. I will ask you to tell us what the prescription is, what medicine was prescribed by the prescription, which is Plaintiff's Exhibit No. 6, which I now hand you.

A. Saturate solution of potassium iodine, one ounce; signa, 10 drops twice a day after meals in half a glass of milk.

(Testimony of Stephen G. Seech)

Q. What was the purpose of that medicine?

A. The purpose of that medicine is to hasten the absorption of blood.

Mr. Herndon: That is all, your Honor, with this witness.

Cross-Examination

Q. By Mr. McGinley: Dr. Seech, do I summarize your findings on October 11, 1937, to be that the condition of Abe [44] Lutz that you treated had completely cured up on that day? A. It did.

Q. I understand he came back to see you on a date subsequent to October 11, 1937? A. He did.

Q. And on May 21, 1938, do I understand that the condition for which he came to you, and which you had treated, had been cured up so that his vision was 20 over 20, being normal? A. Right.

Q. And when he was discharged as a patient of yours, during the month of May, 1938, you found nothing short of normal in the condition for which you had treated him?

A. Right.

Mr. McGinley: That is all.

Q. By Mr. Herndon: Doctor, do I understand that your examinations and treatments were related exclusively to the eyes? A. Correct.

Mr. Herndon: That is all. [45]

* * * * *

PRESTON B. BROWN,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Preston B. Brown.

Direct Examination

Q. By Mr. Herndon: Where do you reside?

A. 885 South Lucerne Boulevard.

Q. What is your business or occupation?

A. District claim representative, Equitable Life Assurance Society of New York.

Q. Do you maintain your office in Los Angeles?

A. 607 South Hill.

Q. How long have you been so engaged?

A. I have been with the company 24 years. On the claims end of the business for about 20.

Q. Now, I show you a letter, a photostatic copy of a letter on the leterhead of Equitable Life Assurance Society of the United States, bearing date June 23, 1944, bearing a signature purporting to be that of Preston B Brown, this photostatic copy of letter being a part of Exhibit 1 for identification to the deposition of Freeman P. Spinney, and I will ask you whether or not you have previously seen the original of said letter?

A. I have.

Q. Did you write that letter? [46]

A. I wrote the letter.

Q. Did you send it to the addressee? A. Yes.

Q. I will now ask you to examine an instrument reading as follows: "This will authorize you to furnish the bearer who represents The Equitable Life Assurance Society of the United States with any and all information you may have concerning the medical history, illness and

(Testimony of Preston B. Brown)

treatments of Abe Lutz, deceased", purporting to bear the signature of Harry Lutz, 1012 South Highland Ave., Los Angeles, Calif., relationship, son, dated June 7, 1944, this instrument being a part of Exhibit 1 for identification, attached to the deposition of Freeman P. Spinney, and I will ask you whether or not you have previously seen the original of the document appearing to be identical with the instrument I now show you? A. I have.

Q. Will you state whether or not you sent the original of such instrument with your letter of June 23, 1944, to which you have been referred?

A. Yes, enclosed with this letter.

Q. I will now show you photostatic copy of a letter dated June 26, 1944, addressed to you, purporting to bear the signature of H. M. Benning, M.D., and I will ask you whether or not you received the original of that letter?

A. I did, and the original was subsequently transmitted [47] to our home office.

Q. Do you know where the original letter now is?

A. I assume it is at the home office.

Q. Where is your home office?

A. 393 Seventh Avenue, New York City.

Q. Did you read the original of the letter from Dr. Benning, dated June 26, 1944?

A. Do you mean when I received it?

Q. Yes. A. Surely.

Mr. Herndon: You may cross examine.

Mr. McGinley: May I inquire, your Honor, if counsel is offering the correspondence that the witness identified?

Mr. Herndon: We intend to offer it, your Honor, and I presume I may do so at this time, and we do now offer in evidence as one exhibit, the letter dated June 23, 1944,

addressed to the Sansum Clinic, Santa Barbara, California, signed by Preston B. Brown, the authorization dated June 7, 1944, signed by Harry Lutz, which the witness has testified was transmitted with the letter of June 23, 1944, and the letter from Dr. Benning addressed to Mr. Preston B. Brown, dated June 26, 1944, all three of which instruments are a part of Plaintiff's Exhibit No. 1 for identification, attached to the deposition of Freeman P. Spinney, and Dr. H. M. Benning.

The Court: May I see the document, please? [48]

Mr. Herndon: May I state, your Honor, that these exhibits consisting of these three instruments, and all of the testimony of this witness, has been offered and introduced for the sole and exclusive purpose of proving waiver of the privilege, and proving that the defendant and counter-claimant Harry Lutz is estopped now from asserting privilege, and for no other purpose.

Mr. McGinley: Having in mind that the evidence is offered for that sole purpose, to-wit, the question of proving that the privilege has been waived, the defendant objects to the documents on the following grounds:

First: As of the authorization dated June 7, 1944, on the ground that the authorization is limited to the Equitable Life Assurance Society, in connection with the claim upon a policy of insurance in which the defendant, Harry Lutz, is beneficiary, and was furnished to the Equitable Life Assurance Society in connection with negotiations conducted subsequent to the death of Abe Lutz, and is, therefore, limited, and not general.

2. On the ground that the authorization was given at a time subsequent to the decease of the patient, Abe Lutz, and does not come within the exceptions of Sec. 1881, sub 4, California Code of Civil Procedure, and is, therefore, not competent to establish the matter of waiver of privilege; and,

3. On the ground that as to the parties to this [49] litigation, the correspondence between the beneficiary, Harry Lutz, and the Equitable Life Assurance Society, would be hearsay on the question of waiver or privilege as affects the deceased, Abe Lutz.

Now, if your Honor please, the letter of January 23, 1943, from Preston B. Brown, to the Sansum Clinic, is objected to upon the following grounds: First, it is immaterial to any issues in this case, in that it purports to refer to a claim of the beneficiary against another insurance company, the Equitable Life Assurance Society;

2. It is hearsay, as far as the present litigation is concerned.

The letter of June 26, 1944, is objected to on the following grounds: That there has been no foundation laid in that the purported signature of H. M. Benning, M.D., is not proven—may I withdraw that ground, your Honor, because I think there is no question about this being Benning's letter, and restate the last ground? I noticed it is signed by typewriter, but I will withdraw that ground of objection.

The letter dated June 26, 1944, purporting to be from H. M. Benning, M.D., to Preston B. Brown, is objected to upon the following grounds: First, there has been no foundation laid that the matter of privilege under Sec. 1881, sub 4, has been waived.

2. That the matter called for by said communication [50] constitutes privileged matter under Sec. 1881, sub 4;

3. That it affirmatively appears that the information disclosed in the letter constitutes declarations and treatment prescribed by H. M. Benning, M.D., a licensed physician, at a time when said physician was treating the deceased, Abe Lutz; and

The last ground, that the letter discloses alleged statements of the deceased subsequent to the date when he applied for the insurance with plaintiff's company in this action, and such statements, in so far as the beneficiary, Harry Lutz, is concerned, are not part of the res gestae, constitute hearsay, and are not binding upon Harry Lutz.

The Court: Your basic objection, as I understand it, is that the California Code, which is applicable, and particularly Section 1881, entitled: Confidential communications; subdivision 4, entitled: Physician and patient, indicates that information acquired by a licensed physician in attending a patient, which information was necessary to enable him to prescribe or act for the patient, is a confidential communication, and that the only person who can waive it is the patient himself, unless the waiver is governed by exceptions 1, 2, 3 or 4 immediately following, and that none of those sections are applicable in this case for the reason that it is not a contest of a will under 1:

that it is not an action or proceeding brought to recover damages on account of the death of the patient under 2; [51] that it is not an action to recover damages for personal injuries under 3; and that it is not an action by the executor or administrator of the estate, or the surviving spouse, or by the children, to recover for the death of the patient, and that therefore, the ability to consent being by the express terms of the statute limited to the patient the son has no right to make a waiver? Is that the point?

Mr. McGinley: Yes, your Honor. You ask if that is my basic objection. That is my basic objection, but the other one, I think, is of equal dignity and merit, and that is that when the waiver is given by a beneficiary on a policy, to an insurance company, when there is no indication that the policy will not be paid, that, under the statutes, constitutes a waiver much broader than either of the waivers here. Courts hold that that is a limited waiver, instead of a general waiver, and that is a waiver which is referred to in this last offer of documents. But your Honor has stated my position with reference to the section, and I have quoted the California cases in my pre-trial memorandum, which goes so far as to hold that when a patient has died that our courts are so jealous of protecting the privilege in favor of the patient that unless they come within the express terms of the section they do not have power to waive the privilege on behalf of the deceased, so much so that at one time in the State of our progressive legislation, that the administrator could not waive it on [52] behalf of the deceased; then the legislature came along and amended that section, expressly including the administrator.

(Discussion.)

(Testimony of Preston B. Brown)

The Court: We don't want to keep this gentleman waiting here all day while we discuss this. Let us go ahead and take this testimony, subject to a motion to strike, and then we will see what happens.

Cross-Examination

Q. By Mr. McGinley: Mr. Brown, was the communication of June 23, 1944, the first communication that you had written relative to the claim of Harry Lutz, on a policy issued by the Equitable Life Assurance Society on the life of *your* father?

A. Is that the letter to the Sansum Clinic?

Q. Mr. Brown, I am handing you the deposition to which counsel has referred, and I direct your attention to a letter dated June 23, 1944, on the stationery of the Equitable Life Assurance Company, signed by yourself. My question is, was that the first communication that you wrote in regard to this matter?

The Court: To the Sansum Clinic?

Mr. McGinley: Yes.

A. Oh, yes, that's the first and only letter, that I recall.

Q. Your purpose in corresponding with the Sansum Clinic was relative to an investigation to be made by you [53] after the death of Abe Lutz?

A. That is correct, sir.

Q. And the forwarding of the authorization dated June 7, 1944, was to enable you to obtain information from the Sansum Clinic relative to the investigation you were making? A. That's right.

(Testimony of Preston B. Brown)

Q. The reply that you received from the Sansum Clinic, dated June 26, 1944, was that information forwarded to the Equitable Life Assurance Society as part of your investigation on the claim of Harry Lutz, following the decease of his father? A. It was.

Q. Do you have any records with you to state when your investigation was concluded and the results of the action of the Equitable Life Insurance Company?

A. No.

Mr. Herndon: That is objected to, if your Honor pleases, upon the ground that it is purely immaterial, outside and beyond the scope of the direct examination.

The Court: As I understand, the answer was no, so it is immaterial. A. That is correct, sir.

Mr. Herndon: I did not hear the answer.

Mr. McGinley: That is all. [54]

* * * * * * *

Mr. Herndon: If your Honor please, I wish at this time to read in evidence the deposition of Dr. Harold M. Frost. I don't know whether it would be better to have the objections ruled on as the questions are read, or not.

The Court: I imagine so. You have reserved the objections, haven't you? Where was this taken?

Mr. Herndon: It was taken in Boston on written interrogatories, direct interrogatories prepared by us, and cross interrogatories.

The Court: Suppose you read the question, the objection, and then the answer, in that form.

(Testimony of Preston B. Brown)

Mr. Herndon: Very well, your Honor. I wonder if it would be satisfactory if Mr. Anderson would read the deposition? My voice has about failed me.

The Court: Yes. [75]

Mr. McGinley: May I say this, your Honor, in regard to the deposition: The deposition which is about to be read, was taken pursuant to written stipulation, which reserved to the defendants all of the objections which could be made to the testimony of Mr. Frost, if he were personally in court, and called as a witness to testify. Additionally, in order that counsel might overcome the objection as to the form of the question, the stipulation specifically provided the specific objections which were objected to on the ground of form; it was sort of an unorthodox procedure, but we were willing to do so, as I wanted to accommodate counsel so that there would be no interruption or delay in getting the deposition out.

The Court: Read the question and the objection, and I will rule on it.

[Note: Deposition of Harold M. Frost deleted at this point pursuant to stipulation on file herein.]



HARRY LUTZ,

the defendant, called for cross examination, having been first duly sworn, testified as follows:

Cross-Examination

Q. By Mr. Herndon: Your name is Harry Lutz?

A. Yes.

Q. You are one of the defendants in this action?

A. Yes.

Q. And counterclaimant? A. Yes.

Q. What is your relationship to Abe Lutz, deceased?

A. A son.

Q. At this time, Mr. Lutz, I hand you Plaintiff's Exhibit No. 2 in evidence, being the application for the policy of insurance involved in this action, and will ask you whether you signed that application?

A. I did.

Q. Did you pay the first premium on the policy?

A. I did.

Q. Was that premium at the time of the signing of this application? A. Thereabouts.

Q. Either at that time or a few days later?

A. Yes, sir.

Q. And did you pay the second premium on the policy? A. Yes. [97]

Q. Do you recall approximately when you paid the second premium? A. For December, 1944, I guess.

Q. As a matter of fact, Mr. Lutz, you paid the first premium at the time the policy was delivered, did you not?

A. Thereabouts. I don't know if it was a day either way.

Q. By whom was the policy delivered to you?

A. I don't remember.

(Testimony of Harry Lutz)

Q. You don't remember from whom you received the policy? A. No, I don't.

Q. When do you first recall having had the policy in your possession?

A. I couldn't tell. Maybe a day or two after I paid the premium.

Q. Is it your recollection now that you paid the premium at about the time the policy was delivered?

A. Yes.

Q. But you don't remember to whom you paid the premium? A. I think it was Stanley Leeds.

Q. After the policy was delivered to you, what did you do with it?

A. I think my father put it in his safety deposit box.

Q. Did you give it to your father?

A. Yes, I handed it to him. [98]

Q. Did you subsequently see it in the safety deposit box? A. No.

Q. Did your father tell you that he had placed it in the safety deposit box? A. Yes.

Q. Who had access to that particular box?

A. My father and myself.

Q. Anyone else? A. No.

Q. Both you and your father had access to the safety deposit box in which you say this policy was placed, from December 1, 1942 until the date of your father's death, did you not? A. Yes.

Q. Are you the owner of the policy of life insurance that is involved in this case? A. Yes.

Q. You paid all of the premiums that were paid on it out of your own personal funds? A. Yes.

Q. Did you live with your father in your father's home during the year 1942? A. No.

(Testimony of Harry Lutz)

Q. Were you associated in business with your father during the year 1942? [99] A. Yes.

Q. And saw him almost daily during the year 1942? A. Yes.

Q. Were you with him in the same office? A. Yes.

Q. Do you know Dr. Maurice H. Rosenfeld?

A. I don't know him. The first time I met him was the night that my father passed away.

Q. At the date when you signed the application for the policy involved in this case did you know that your father had previously consulted Dr. Rosenfeld?

A. No.

Q. Do you know Dr. Stephen Seech? A. No.

Q. You don't know the doctor? A. No, sir.

Q. At the time that you signed the application, Plaintiff's Exhibit 2, which I have shown you just a moment ago, did you know your father had consulted Dr. Seech?

A. No.

Q. At the time you signed the application for the policy involved in this action had your father told you that he had consulted either Dr. Rosenfeld or Dr. Seech?

A. I don't remember whether he did tell me about Rosenfeld, but I am positive he never told me about Seech.

Q. Do you know Dr. Fred Polesky? [100]

A. Yes.

Q. Did you know, at the time you signed the application for the policy involved in this case, that your father had consulted Dr. Polesky? A. About the policy?

Q. No. A. How many years are you taking in?

(Testimony of Harry Lutz)

Q. I am asking you whether you knew, at the time you signed the application that your father had previously consulted Dr. Polesky?

A. Well, I don't quite understand your question. Previous—how long did that take in?

The Court: At the time that you signed the application did you know that at any time prior to that date your father consulted Dr. Polesky as a physician?

A. How many years back?

The Court: Any number. A. Oh, yes, yes.

Q. By Mr. Herndon: When was it that your father had seen Dr. Polesky?

A. I would say around 1935.

Q. Did you say, Mr. Lutz, that you did not know, at the time you signed the application, that your father had been treated by Dr. Rosenfeld?

A. No, he had been treated by Dr. Rosenfeld, as far as I know, about gas pains. [101]

Q. Then you did know at the time you signed the application that your father had consulted Dr. Rosenfeld about gas pains? A. Yes.

Q. At the time you signed the application for the policy involved in this case did you know that your father had consulted Dr. Rosenfeld on more than one occasion prior to that? A. No.

Mr. McGinley: If your Honor please, may the answer go out for the purpose of objection?

The Court: The answer was no.

Q. By Mr. Herndon: You say that prior to the date when you signed the application for the policy in suit your father had suffered gas pains? A. Yes.

Q. And prior to the date of the application, that is, prior to November 14, 1942, your father had told you,

(Testimony of Harry Lutz)

had he not, on several occasions that he was suffering from gas pains?

A. Not several. He told me he was suffering from gas pains.

Q. On how many different occasions would you say, approximately, your father had told you he was suffering from gas pains, that is, prior to November 14, 1942?

A. One or two.

Q. On each of those occasions did your father refer to [102] his pains as being indigestion? A. No.

Q. Isn't it a fact that on several occasions during the year 1942, and prior to November 14, 1942, your father told you that he had consulted Dr. Rosenfeld?

A. No.

Q. At the time you signed the application for the policy in suit, did you know that your father was taking medicine?

A. Well, I knew he had a bottle with him, but I did not know what it contained.

Q. Did you ever see your father take anything out of that bottle and put it in his mouth? A. Yes.

Q. What were they, tablets?

A. They were little pills. I wouldn't know what they were. I don't know what they contained.

Q. Did you ever discuss with your father what those tablets were?

A. Yes, he said he took them just to relieve his gas pains.

Q. How many times would you say that your father told you that, in substance, prior to November 14, 1942?

A. Question, please?

Q. Will the reporter read the question?

(Question read by the reporter.) [103]

(Testimony of Harry Lutz)

A. I don't get the question.

Q. By the Court: How many times did your father tell you that he was taking this medicine for gas pains, prior to the time you signed the application?

A. That was never discussed.

Q. By Mr. Herndon: You said a moment ago that on one occasion at least he told you that he was taking the pills for gas pains? A. That's right.

Q. Did he tell you that on more than one occasion prior to November 14, 1942?

A. Well, after I seen him take them I knew what he was taking them for. He did not have to tell me again.

Q. How many times prior to November 14, 1942 would you say you observed your father taking these pills? A. Several times.

Q. Did your father ever tell you, prior to November 14, 1942, that Dr. Rosenfeld advised him to cut down on his activities and restrict his activities? A. No.

Q. Prior to November 14, 1942 did your father ever discuss with you what Dr. Rosenfeld had told him?

A. No.

Mr. Herndon: No further questions at this time, your Honor.

Q. By Mr. McGinley: Mr. Lutz, you signed the application, [104] which is part 1 of the application, on November 14, 1942, is that right?

A. About that time.

Q. And it was subsequent to that, and on November 16, 1942, that your father appeared before Dr. Waste, to be examined for insurance?

Mr. Herndon: May I have the question read?

(Question read by the reporter.)

(Testimony of Harry Lutz)

Mr. Herndon: I object to that, if your Honor please, upon the ground that no foundation has been laid, and that it is leading and suggestive.

The Court: Objection sustained.

Mr. McGinley: No further questions, your Honor.

Mr. Herndon: If your Honor please, in view of the additional matters of foundation which have been received in evidence subsequent to the time that plaintiff previously offered the notes of Dr. Rosenfeld, which I believe are identified now as Defendants' Exhibit A, we would again at this time offer those notes in evidence, particularly by reason of the fact that a portion of the notes were read into the record in response to questions propounded by counsel for the defendant.

Mr. McGinley: The defendants object to the notes, being the memorandum referred to by the witness, Dr. Rosenfeld, on direct examination, as well as on cross examination, on the ground that they were used to refresh [105] his memory, and are incompetent to establish the truth of any recitals contained in the memorandum.

The Court: It is my understanding that there is nothing contained in the notes that has not already been testified to. If so, it just clutters up the record to put them in. The offer will be declined.

Mr. Herndon: I think it has been stipulated, or at least understood, your Honor, that in all of the depositions in which photostatic copies have been used, it may be deemed that they have the same force and effect as though they were originals.

Mr. McGinley: The defendant so stipulates, your Honor.

Mr. Herndon: The plaintiff rests. [106]

* * * * *

HARRY LUTZ,

recalled as a witness by and on behalf of the defendants, having been heretofore duly sworn, testified as follows:

Direct Examination

By Mr. McGinley:

Q. Mr. Lutz, you have previously testified and been sworn, have you? A. Yes.

Q. How long had you been associated with your father in business, up until his death, Mr. Lutz?

A. About 15 years.

Q. That is, in the City of Los Angeles?

A. Yes.

Q. What was the nature of your father's business?

A. Structural steel and jobbing of steel.

Q. Originally what was your father's business?

A. Junk business.

Q. Where was your father born? A. Russia.

Q. Do you know how old he was when he came to this country? A. About 13 years old, I think.

Q. To your knowledge, did your father attend any schools? A. No.

Mr. Herndon: That is objected to, if your Honor please, on the ground that it is immaterial and hearsay. [169]

The Court: Objection sustained.

Q. By Mr. McGinley: Will you describe what your duties were in connection with your father's business?

A. Salesman, purchasing, general shop work, and a little office work.

Q. Will you describe your practice, as between you and your father, in answering the correspondence relative to business matters?

(Testimony of Harry Lutz)

Mr. Herndon: That is objected to by plaintiff, if your Honor please, upon the ground it is wholly immaterial to any matter in issue in this case.

Mr. McGinley: As part of our defense, your Honor, we have alleged that the deceased, with the exception of popular words, and a few instances, such as his name, was unable to read and write the English language, and this proof is primarily to show that in conducting the business of the deceased that letters received in English and answers which were forthcoming to those letters in English were attended to by the son and those who were associated with the father.

Mr. Herndon: In view of the statement of counsel of his purpose, we add the further objection that the question is wholly immaterial; that the question of whether or not the insured could read or write is immaterial, in that under the law the contracting party presumptively knows what the contract is, and in the absence of reformation of the contract, the contract cannot be so challenged or repudiated, even if [170] the foundation for reformation were laid, by proper pleading, still it would not be competent so to do on any grounds of unilateral mistake. There is no allegation that any fraud or imposition was practiced upon either the insured or the defendant and counter-claimant by plaintiff, so under no theory, if your Honor please, would the question before the Court be material, nor would the question of whether the insured could read or write be material to any issue in this case.

Mr. McGinley: If your Honor please, in the last case cited in the pre-trial memorandum, a late decision, our Supreme Court has said that in viewing insurance contracts, where they are prepared by highly specialized

(Testimony of Harry Lutz)

experts, where their manner of handling is a little bit out of the ordinary, of ordinary contracts, that the courts do not view a policy of insurance in the same manner as they do the ordinary contract, when an issue is raised as to its meaning, and in that light this evidence is directed to the fact, in addition to the ground of illiteracy, in the respects which I have mentioned, that at the time the medical examiner for the insurance company made the examination, there was no mention made to the decedent that in addition to signing an application for insurance he was also waiving the benefits of privileged communication.

(Discussion.)

The Court: Regardless of the weight to be given the [171] testimony, and whether or not the testimony would accomplish the purpose, our courts of law have their hands entirely tied on a matter of that kind, because the man in question has died. You had better think that over between now and 2:00 o'clock. [172]

* * * * *

HARRY LUTZ,

resumes the stand for further

Direct Examination

By Mr. McGinley:

Mr. McGinley: If your Honor please, may I withdraw the last question which was asked just before adjournment, for a few more foundational questions?

The Court: Very well.

(Testimony of Harry Lutz)

Q. By Mr. McGinley: I believe you testified, Mr. Lutz, that about 15 years ago you went to work for your father in his business? A. Yes.

Q. And you worked continuously from that time up until what day?

A. September; I think about the 20th, when I went into the Navy.

Q. September 20th of what year? A. '43.

Q. You were in the Navy from September, 1943, until what date?

A. Approximately the 20th of September, 1944.

Q. Of 1944? A. Yes. [173]

Q. During the period commencing with the date of your first working for your father in his business, and up until you went into the service, how frequently did you see your father at your father's place of business?

A. About every day, except if he would go on a vacation, something like that.

Q. What portion of the working day during that period of time would you spend at your father's place of business? A. From eight to ten hours a day.

Q. And during that period of time you were in the same office as your father? A. Yes.

Q. Will you state to the Court what you observed, insofar as your father was concerned, with reference to answering correspondence relative to your father's business?

Mr. Herndon: The plaintiff objects to the question upon the ground that it is wholly immaterial what his father's practice was with respect to the subject under inquiry.

(Testimony of Harry Lutz)

The Court: Well, it may be, but I think under the Federal rules, there being no jury, that I shall receive it subject to a motion to strike.

A. Well, we were in the steel business in the later years, and buying and selling plants, and every time anything would come up as to any contracts, or any reading, we would have to, myself or my brother-in-law, one of us, would have to read this contract or contracts to my father, or any [174] detail that had a certain thing to do with reading or writing on contracts.

Mr. Herndon: The plaintiff moves to strike the answer.

The Court: Don't bother to do that with every question. Otherwise we would never get through. Go ahead

Q. By Mr. McGinley: Who is the brother-in-law to whom you refer? A. Ed Friedman.

Q. Will you state what you observed during the period of time which you have mentioned being with your father in his business, of the acts of your father with reference to answering correspondence received by him?

Mr. Herndon: I presume, your Honor, it is understood this is all subject to the same objection?

The Court: Let it be stipulated that all these questions regarding his illiteracy of the English language, are objected to for the reasons indicated, and they are received subject to a motion to strike.

Mr. McGinley: So stipulated.

The Court: You may answer.

A. We had to read and write everything for my father, my brother-in-law and myself.

(Testimony of Harry Lutz)

Q. By Mr. McGinley: When you use the expression "we", to whom do you refer?

A. My brother-in-law and myself.

Q. When you received the policy in suit. I mean the [175] physical possession of it, did you believe the policy of insurance valid and enforceable? A. Yes.

Mr. Herndon: If your Honor please, I object to that question upon the ground that it is immaterial.

The Court: Objection sustained.

Q. By Mr. McGinley: Prior to the delivery to you of the policy in suit, did you have a conversation with Mr. Stanley Leeds relative to the issuance of the policy?

A. Yes.

Q. Where did the conversation take place?

A. I think it was in our office, 2500 Santa Fe Avenue.

Q. What was the approximate date?

A. Well, I think it was about a month before the policy was issued.

Q. Was anyone present besides yourself and Mr. Leeds? A. And my father.

Q. Without giving the details of the conversation yet, was the purpose of procuring the policy discussed?

A. Yes.

Q. Will you state the conversation, stating what you said, and what Mr. Leeds said? [176]

Mr. Herndon: That is objected to by plaintiff, if your Honor please, upon the ground that it is wholly immaterial; that it is hearsay so far as this plaintiff is concerned, and not in any way binding on the plaintiff, and that no proper foundation has been laid indicating or tending to indicate that it could be binding on the plaintiff.

(Testimony of Harry Lutz)

Mr. McGinley: If your Honor please, one of the allegations of the defense of estoppel is that the plaintiff insurance company knew that the policy in suit was being issued to take care of an estate tax program, and it is further alleged that in reliance on that situation, which was communicated to the plaintiff company, this beneficiary received a paid-up policy, which was then outstanding on the life of his father, the net result being that had not this policy been issued he would not have accepted the disadvantage of receiving a paid-up policy. In Mr. Morgan's deposition, referring to the letter of December 8, 1942, the first paragraph discloses knowledge of the fact that the beneficiary had a tax problem, it reading as follows:

"As far as insurance interest is concerned, you will notice that Mr. Lutz, the proposed insured, now owns a considerable line of life insurance, and has an estate tax problem."

I developed this morning, in the examination of Mr. Morgan, that before he wrote the letter of December 8, 1942, he had discussed the matter of the issuance of this policy [177] in suit with Mr. Leeds. Now, Mr. Leeds who was the party to this conversation, is noted on Part 1 of the application attached to the policy in suit, as the soliciting agent for the plaintiff insurance company. While that is stepping from one stone to another, it probably is the only way that I can show knowledge, first from the soliciting agent, then the special general agent, Mr. Morgan, and if I am correct in my position this morning, that after the deposition was read, that would be notice confirmed by the letter to Mr. Morgan.

(Testimony of Harry Lutz)

The Court: What difference does it make what the insurance was secured for?

Mr. McGinley: This difference; I submit, under the defense of estoppel it is necessary to show a change or prejudice in position. Under the defense of waiver it is not. Under the defense of estoppel, if this insurance company knew that this policy was issued to take care of a tax problem, and the beneficiary, in reliance on the issuance of the policy, changed its position, that is an essential fact which constitutes one of the elements of estoppel.

The Court: I think we are going around Robin Hood's barn; yet it may be possible you can connect it up. With that understanding, subject to a motion to strike, I will permit it.

Mr. McGinley: May I have the reporter read the question, [178] if your Honor please?

Mr. Herndon: May I inquire, your Honor, as to the time? I am not clear as to the time of this conversation.

The Court: I thought he had fixed it. When was this conversation?

A. About a month or two before the policy issued. Mr. Leeds came into the office and set up our tax problem with our auditor, and at that time I was carrying a \$38,000 policy on my father, and we just got a policy from the Equitable,—two \$5,000 policies—

The Court: Just tell what was said in words; not what was in your mind. What was said in this conversation?

A. And he said that I should take a paid-up policy on this \$38,000 policy, of \$15,000, and cancel our bal-

(Testimony of Harry Lutz)

ance of the policy, and take a new policy out of \$13,000 with an insurance company.

Q. By Mr. McGinley: Have you give us, as nearly as you can recall at this time, all of the conversation with Mr. Leeds? A. I think so.

Q. Subsequent to your receiving the insurance policy from the New England Mutual Life, state whether you cancelled and received a paid-up policy on the \$38,000 policy that you mentioned?

Mr. Herndon: Plaintiffs objects on the same grounds.

The Court: The objection is sustained. [179]

Mr. McGinley: May I inquire then of your Honor if I should state an offer of proof of what I intend to show?

The Court: There has got to be some limit to every lawsuit. You can't chase all around Robin Hood's barn. After all, when a man cancels a policy there is supposed to be some sound reason for it, and the fact that he did is not the important matter, because, as a matter of fact, if he relied upon the representations at the time, all right; what difference does it make what happened? What difference does it make what happened last week, or that he happened to have dinner with John Doe's wife's sister's husband's aunt? Are we going to go into that too?

Mr. McGinley: No, your Honor, I had not intended to be that remote. I want to show that on reliance of the validity of this policy he cancelled and accepted a paid-up policy on the \$38,000 policy, thereby changing his position.

May the record show that through this witness I offer to prove that subsequent to the receipt of the policy in suit this witness cancelled a \$38,000 policy under which he was

(Testimony of Harry Lutz)

the beneficiary, and received a paid-up policy in the sum of \$15,000?

The Court: May it be stipulated that if this witness were asked that question he would so answer?

Mr. Herndon: Yes, your Honor.

The Court: So stipulated. That takes care of that.

Mr. McGinley: That is all. [180]

Cross-Examination

Q. By Mr. Herndon: Mr. Lutz, referring to the conversation to which you testified a moment ago, with Mr. Leeds, in the office of the Western Iron and Metal Company, at which you say your father was present, that was prior to the filing of the application, wasn't it?

A. Yes.

Q. Do you recall the occasion of the taking of your deposition in the office of your counsel on March 2, of this year? A. Yes.

Mr. Herndon: May I state to counsel for defendants that I propose to show the witness his deposition, and ask him to read particularly page 5, line 1, to page 6, line 26. May I show it to the witness, your Honor?

The Court: Yes.

Q. By Mr. Herndon: Mr. Lutz, I will ask you to read page 5, line 1, to page 6, line 26.

A. —how long have you known Mr. Leeds—

Q. No, just read it to yourself. A. Yes.

Q. Have you read all of the portion that I indicated to you? A. No.

Q. Read also all of page 6. Now, if your Honor please, for the purpose of impeachment, and by virtue of the [181] provisions of Rule 26(f), Rules of Federal

(Testimony of Harry Lutz)

Procedure, I should like to read from the deposition of the defendant and counterclaimant, Harry Lutz, given on March 2, 1945, reading from page 5, line 1, to page 6, line 26, as follows, and I will ask the witness whether the following questions were asked, and the following answers given by him:

"Q.—How long have you known Mr. Leeds?

"A.—About four years.

"Q.—Has he been your agent to place other insurance?

"A.—Yes, sir.

"Q.—And who talked to Mr. Leeds about this application, if you know?

"A.—Well, he usually dopes up something, and he usually brings out a policy without you even asking him to.

"Q.—Well, do you know what the procedure was in this case?

"A.—Well, he wanted me to have a policy; my father wanted me to have a policy on my father's life for my own income.

"Q.—And what did you or your father do about it, so far as getting the insurance is concerned?

"A.—We must have went ahead and done it, because this is the policy.

"Q.—Well, did you talk to Mr. Leeds about it?

"A.—I talked over afterwards, I guess I talked to him before, to dope up something so I would have some income. [182]

"Q.—Do you recall the conversation?

"A.—Only that we both talked together, and he said well that I should be independent of the business, and should have some life insurance on my father.

(Testimony of Harry Lutz)

"Q.—What did you say to him in response to that?

"A.—I told him I thought it was a very good idea.

"Q.—Was there any discussion of estate tax in your conversation?

"A.—No.

"Q.—And did you say anything to Mr. Leeds as to whether or not you wanted him to go ahead and get the policy for you?

"A.—I must have. He went ahead and got the policy.

"Q.—Well, do you recall whether or not you did?

"A.—Well, I will say yes.

"Q.—You don't recall what you said to him?

"A.—No, I don't; not word for word, no.

"Q.—Well, just the substance of it.

"A.—Well, I said that it was a good idea, and to go ahead and make up the policy.

"Q.—When did you next see the application after Mr. Leeds took it, after you had signed it?

"A.—I don't think I seen the application; I just saw the policy.

"Q.—When did you see the policy?

"A.—Well, after he brought it down, when I gave him the check for the premium. [183]

"Q.—Do you recall that date of that?

"A.—No, I don't.

"Q.—And did you look at the policy at that time?

"A.—No, I don't believe I did.

"Q.—What did you do with the policy?

"A.—Put it in a safe deposit box."

Do you remember those questions being asked you?

A. I do.

(Testimony of Harry Lutz)

Q. And were those answers given by you?

A. Yes.

Q. Mr. Lutz, your father was the owner of the Western Iron and Steel Company? A. Yes.

Q. That business consists of the processing and manufacturing of steel products? A. Fabrication.

Q. Your father for many years was the sole owner of that business? A. Yes.

Q. Is it not a fact that during the calendar year of 1942 the business of which your father was the owner made net sales of steel products of approximately \$400,000? A. Somewheres about.

Q. You are the executor of your father's estate?

A. Yes.

Q. Your father left an estate appraised in excess of [184] \$100,000, did he not? A. I think so.

Q. During the year 1942 the profits from the business owned by your father were in the neighborhood of \$200,000, were they not? A. No.

Q. What were they? A. Around \$100,000.

Q. Your father was in active participation in the conduct of the business? A. Yes.

Q. What duties did your father perform in connection with the conduct of the business, during the year 1942? A. Manager.

Q. And as manager, what were his duties? What did he do?

A. To see that everything run smooth. He purchased, went out on deals to buy, to sell.

Q. Mr. Leeds had been your agent for the procurement of other insurance, had he? A. Myself?

Q. Yes. A. Yes.

(Testimony of Harry Lutz)

Q. With respect to life insurance matters you consulted Mr. Leeds and followed his advice generally in the procuring of insurance? [185] A. Yes.

Mr. McGinley: If your Honor please, may I ask that the answer go out for the purpose of objecting?

The Court: Yes.

Mr. McGinley: That is objected to on the ground that by plaintiff's own contract Stanley Leeds was soliciting agent of the insurance company, as shown on Part 1 of the policy in suit.

The Court: That is one of the things I was trying to avoid. I think two wrongs don't make a right. I think I will let him answer. The answer may stand.

Mr. Herndon: No further questions.

The Court: Both of you understood that what I was trying to do was to save time; that when I said if he were asked that question he would so testify, that I meant that was going in as evidence, subject to a motion to strike, so the question is presumed to be answered just as he indicated, that he did cancel that policy, and received the benefits from it.

Mr. McGinley: I so understood. May I have one or two questions?

The Court: Surely.

Re-Direct Examination

Q. By Mr. McGinley: Mr. Lutz, counsel has read from your deposition, pages 5 and 6, relative to the conversation between yourself and Mr. Leeds. I want to ask you if you [186] had more than one conversation with Mr. Leeds regarding the issuance of the policy in suit? A. Yes.

(Testimony of Harry Lutz)

Q. And the conversation that you testified to on direct examination, I believe you said your father was present when he mentioned the estate tax problem? A. Yes.

Q. And you had conversations with Mr. Leeds regarding the policy in suit, when your father was not present? A. Yes.

Mr. McGinley: That is all.

Recross-Examination

Q. By Mr. Herndon: Mr. Lutz, was the conversation with Mr. Leeds, at which your father was present, and concerning which you testified on direct examination, prior or subsequent to the conversation concerning which you testified in your deposition? A. I don't know.

The Court: You don't know? I do not understand the answer.

A. I don't know whether it was before or after.

Q. You remember there were two conversations, one at which your father was present, and one at which he was not present? A. Yes, sir.

Q. By Mr. Herndon: Where was the conversation had with [187] Mr. Leeds concerning what you testified in your deposition?

A. We were neighbors; we were next door to each other, practically, and seen each other practically every day.

Q. That does not answer my question.

A. I am sorry.

Q. Where was the conversation had concerning which you testified in your deposition?

A. I don't remember that.

Q. But you do remember that such conversation was had? A. Yes.

(Testimony of Harry Lutz)

Q. And it was at the conversation testified to in your deposition that you finally told Mr. Leeds to go ahead and get the policy for you? A. Yes.

Q. Then it is a fact that this conversation concerning which you testified in your deposition was the last one that you had with Mr. Leeds prior to the time you signed the deposition, is that true?

A. No, I said I don't remember whether it was prior—before or after.

Mr. Herndon: That is all. [188]

* * * * *

Mr. McGinley: If your Honor please, might I inquire as to your Honor's desires and suggestion as to the manner in which we should handle the motions to strike?

The Court: You can wait until the end of the testimony, until we get this transcript. You don't need to make it now. You may make it at any time up to the end of your case.

Mr. McGinley: If your Honor please, the plaintiff having rested, come now the defendants and counter-claimant and move the court for an order of dismissal, or judgment of dismissal, of plaintiff's complaint, on the following grounds:

First, that no facts have been proved which would entitle plaintiff to a judgment for the relief sought in [106] the complaint;

2. That the only competent testimony to establish a *prima facie* case for plaintiff is privileged testimony of the following persons: (a) The pharmacist, H. C. Ludden; (b) Dr. Seech; (c) Martha Tucker, librarian at the Cedars of Lebanon Hospital, and Miss Duncan,

nurse employed at the Cedars of Lebanon Hospital; (d) Dr. Henry H. Lissner; (e) Dr. Maurice H. Rosenfeld; (f) Dr. Benning of the Sansum Clinic; (g) Mr. Spinney, superintendent of records of the Sansum Clinic. And the documentary proof or exhibits which were offered and received subject to objection on the grounds stated, as part of the examination of the witnesses enumerated; (h) Testimony of Mr. Brown; (i) The testimony of Mr. Arnold, and the testimony of Mr. Harris.

3. That independent of the testimony which was privileged, the testimony of the witnesses enumerated in the foregoing ground, is incompetent on the ground of establishing matters referring to the health and condition of health of the decedent, Abe Lutz, in that it is hearsay as to the defendant and counterclaimant Harry Lutz.

4. On the further ground that the plaintiff's complaint, and the exhibits attached thereto, being notice of rescission, affirmatively disclose that plaintiff has assumed a position of repudiating the policy in suit sued upon, and has denied all liability thereunder, and, as a matter of law is, therefore, prohibited and estopped from [107] claiming the benefits of the waiver referred to and made part of the policy in suit, by the incorporation of the application in its entirely as a part of the policy sued upon.

5. Upon the ground that, as a matter of law, the plaintiff is shown to have waived its right to information which is now claimed to be material as it relates to the health and condition of Abe Lutz under Secs. 335 and 336 of the Insurance Code of the State of California, particularly in that on the application, which is made part of the policy in suit, the deceased, Abe Lutz, furnished the plaintiff company with the name of his attending physician, Maurice H. Rosenfeld, on November 16, 1942,

and thereby placed at the disposal of plaintiff company the exact source of information, which source would have disclosed the information which is now claimed to be material and withheld from plaintiff company.

That under Sec. 336 the right to information of material facts was waived by neglect to make inquiries as to such facts where they were distinctly implied in other facts in which information was communicated. This last ground, your Honor, is the ground which we respectfully submit raises a pure question of law. If your Honor should rule at this time that presumptively the waiver in the policy is valid for the reason that the furnishing of a waiver of confidential communications by the deceased, together with the name of the [108] attending physician, coupled with the information that the decedent, in August of 1942, had been examined and had a physical examination by Maurice H. Rosenfeld, which information appears on the application, is deemed to carry to the insurance company the effect and knowledge of whatever information would have been disclosed by an investigation or statement obtained from the attending physician.

The Court: That motion will be given consideration, and will be decided before the close of the trial. You may proceed. For the purpose of putting on your proof you had better consider your motion is denied.

Mr. McGinley: May I ask this, your Honor: In view of the fact that there has been no ruling on the question of privilege, if counsel will stipulate that I might call Dr. Waste, a physician who consulted Mr.

Lutz, without prejudice to the objections I have heretofore made upon the ground of privilege, and the ground of hearsay.

Mr. Herndon: Your Honor, we hardly feel that that is a proper request. We don't know what counsel has in mind. It may be that he will be gaining a very substantial advantage to which defendant is not entitled by the procedure, and I can't quite see the fairness of the request.

Mr. McGinley: Your Honor, probably I should make this explanation; I am in this position: I am now required to put on my defense testimony. I am doing that without the benefit of a ruling from your Honor, on the matter of [109] privilege. Now, if your Honor should rule right now and say to me: Mr. McGinley, your objection to privilege is not sustained,—then I would know what my course would be to appraise the testimony that is available to us. Should your Honor say to me: Mr. McGinley, I think your objection is good,—of course, that would indicate another course to me; and if counsel is unwilling to stipulate I believe it to be within your Honor's discretion in directing the order of proof, that in view of the fact that there has been a reservation of ruling on the question of privilege, that I should not be prejudiced by calling a witness in order to expedite the trial, in the absence of a ruling.

The Court: So permitted. [110]



JOHN M. WASTE,

a witness called by and on behalf of the defendants' having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. McGinley: If your Honor please, I have had prepared a blown-up enlarged photograph of the application in suit, because of its smallness, and I think it would facilitate the examination of the witness and allow your Honor to have the original in your possession as I interrogate him, if I may use that photostat, merely for illustrative purposes.

The Court: Very well.

Q. By Mr. McGinley: What is your full name, doctor? A. John Morton Waste.

Q. What is your profession? A. Physician.

Q. How long have you been a practicing physician?

A. Since 1910.

Q. And how long have you practiced, or been admitted to practice your profession in the State of California? A. Since 1917.

Q. At the present time do you specialize in any particular branch of the profession?

A. Physical examinations, since 1927.

Q. And since 1927 have you made examinations for any company, other than the Equitable Life Insurance Company? [111] A. Yes, sir.

Q. And how long for a continuous period of time have you been making examinations of persons who apply for insurance? A. Since 1919.

Q. Since 1919? I understand, doctor, that all of that time is devoted exclusively to making examinations on applications for insurance? A. Since 1927.

(Testimony of John M. Waste)

Q. Where do you have your office?

A. 601 South Hill Street.

Q. Will you tell the court just generally what your office consists of in the way of equipment for making examinations?

A. It consists of a reception room, two examining rooms, and a laboratory for men and a separate room for women, for examinations.

Q. And that was the condition during the month of November, 1942? A. Yes, sir.

Q. Did you know Abe Lutz during his lifetime?

A. Only through the acquaintance at examinations.

Q. And when did you first become acquainted with Mr. Lutz?

A. I am not sure, but I believe in 1942.

Q. And during the year 1942 did you make a physical [112] examination of Mr. Lutz? A. Yes, sir.

Q. And where did that examination take place?

A. At our office, 601 South Hill Street.

Q. Was that examination in relation to an application for insurance? A. Yes, sir.

Q. When did you next see Mr. Lutz?

A. I have examined him two or three different times. I think probably three times, during 1942, at different periods during the year. That's the only time I have seen him, on examinations.

Q. In connection with the examinations that you have referred to, have you examined him other than at the office you have described? A. No, sir.

Q. You have not examined him at his home?

A. No, sir.

(Testimony of John M. Waste)

Q. Directing your attention, doctor, to the 16th day of November, 1942, did you make an examination of Mr. Abe Lutz on that day? A. Yes, sir.

Q. That examination was conducted where?

A. At our office, 601 South Hill Street.

Q. At whose request did you make the examination of Mr. Lutz on November 16, 1942? [113]

A. His agent, Mr. Leeds.

Q. Had you received information that the examination was to be made for the New England Mutual Life Insurance Company? A. Yes, sir.

Q. Were you furnished with a blank on the form of the New England Mutual Life Insurance Company?

A. Yes, sir.

Mr. McGinley: If your Honor please, may I look at the original for one moment?

The Court: Yes.

Q. By Mr. McGinley: Doctor, referring to the original application, Part 2, which is in evidence here, would you state if that is the form which was furnished to you for the purpose of making an examination of Mr. Abe Lutz? A. Yes, sir.

The Court: Give the exhibit number for the record.

Mr. McGinley: No. 2 in evidence.

Q. Will you kindly examine Exhibit No. 2 and state whether or not all of the writing on the face of Part 2 is in your handwriting, with the exception of the signature, Abe Lutz? A. Yes.

Q. Directing your attention to Exhibit 2, doctor, and particularly to Question 28: Has any insurance applied for [114] on your life ever been declined, postponed or modified as to kind, amount or rate? You will observe a

(Testimony of John M. Waste)

red crayon there. Will you state whether that red crayon was placed by you on the face of the policy?

A. No, sir.

Q. Directing your attention to Question No. 39 reading as follows, on Exhibit 2: Have you ever had or been suspected of having sugar or albumen in urine? And the red crayon mark which appears to the left of the statement "Sugar or albumen in urine", will you state whether or not you placed the red crayon mark opposite that information? A. No, sir.

Q. Directing your attention to four questions on Exhibit, Questions 31, 32 and 33 and 34, at the end of which appears a red crayon mark, will you state whether or not you placed that red crayon mark on the face of the application, Exhibit 2? A. No, sir.

Q. When you had completed your examination of Mr. Lutz none of the red crayon marks, which I have directed your attention to were on the application, as I understand it? A. No, sir.

Q. As you commenced to examine Mr. Lutz, will you describe to the court the seating arrangement in your office; where Mr. Lutz sat and where you sat, and where the blank application rested? [115]

A. I sat at my desk, like I am sitting now. On the opposite side the applicant usually sits. The application lies in front of me, just like this is placed on the stand here.

Q. And what did you say to Mr. Lutz as you commenced the examination, *Mr. Lutz*?

A. Do you mean in the way of introduction?

Q. Yes, as nearly as you can recall.

A. Well, we usually say "How do you do? I am glad to see you again" something like that, and "Have I ever

(Testimony of John M. Waste)

examined you before?" That is just a sort of introductory conversation we have; and then we proceed to ask him the questions.

Q. Referring to Question 29, and if you wish, doctor, with the court's permission, if the enlarged photograph is more readable on the board, you may refer to that,—please state what you said to Mr. Lutz and what Mr. Lutz said to you.

The Court: It is my understanding, however, that we may be clear, that this examination of this witness, in so far as it may involve confidential matters is without prejudice in the event that I rule there is a privileged communication involved in the testimony of Dr. Rosenfeld, but in the event that I hold that there is no confidential communication, then the evidence stands as a part of your testimony. [116]

Mr. McGinley: That is right, your Honor.

The Witness: What is the question?

The Court: Read it.

(Question read by the reporter.)

A. I can read it better off of here than I can off of there.

The Court: All right.

A. 29; What illnesses, diseases or injuries have you had since childhood? Describe fully? The answer to this do you want?

Q. Go right ahead,—whatever Mr. Lutz said.

A. He gave me influenza, 1918, duration two weeks, mild severity, good results. Slight colds occasionally; none for two years; mild, good results. That's the answer to that.

(Testimony of John M. Waste)

Q. At this examination did you ask Mr. Lutz if he had ever applied for insurance and been declined?

A. That question is Question 28.

The Court: That is not what counsel asked you. Counsel asked you if you asked him that question. You should answer yes or no. A. Yes.

Q. By Mr. McGinley: Will you tell us what you asked Mr. Lutz in that connection, and what he said?

A. I will have to quote my reading here—my writing: Declined, Equitable Life, a few years ago. Standard [117] insurance issuance since. Declined, Equitable Life a few years ago. Standard insurance issued since.

Q. Doctor, did you know on November 16, 1942, independent of your acquiring the information at this examination of Mr. Lutz, that he had been declined for insurance?

Mr. Herndon: That is objected to, if your Honor please, as being wholly immaterial; no foundation laid; not binding on the plaintiff.

The Court: Objection sustained.

Q. By Mr. McGinley: Did I understand you to state, doctor, that you had, prior to November 16, 1942, made an examination of Mr. Lutz for insurance in the Equitable Life?

Mr. Herndon: That is objected to, if your Honor please, on the same grounds, being wholly immaterial; any knowledge that the witness might have had at some previous time would not be binding upon this plaintiff.

The Court: You may answer yes or no.

A. What is the question?

(Question read by the reporter.)

A. Yes.

(Testimony of John M. Waste)

Q. By Mr. McGinley: And was the fact of that examination noted by you at any place on the application which you were preparing for the New England Mutual Life Insurance Company?

Mr. Herndon: If your Honor please, that is objected to upon the ground that the application itself is the best [118] evidence of what appears thereon.

The Court: Objection sustained.

Q. By Mr. McGinley: Did you make use, doctor, of any information you had previously acquired in examining Mr. Lutz, to fill out the application, Part 2, in Exhibit 2 in evidence? A. No.

Q. Again directing your attention to 28, which reads as follows: Has insurance applied for on your life ever been declined, postponed or modified as to kind, amount or rate? I note the answer: Equitable Life—a few years ago—standard issue since. Is that information that was received from Mr. Lutz on November 16, 1942?

A. Yes.

Q. Referring to Question 37: Have you ever had or been suspected of (c) sugar or albumen? Will you state what you said to Mr. Lutz in that connection, and what his answer was?

A. I asked him the question 37, and his answer was as I have written it here: Yes.

Q. Was any explanation, other than the response "Yes" given by Mr. Lutz, doctor?

A. Not that I remember.

Q. Now, directing your attention to the application, Plaintiff's Exhibit No. 2, and to Question 35 thereon:

(Testimony of John M. Waste)

Have you ever suffered from nervous strain or depression? [119] Did you ask Mr. Lutz that question?

A. Yes.

Q. And what was his answer? A. No.

Q. In the course of your examination did you make any tests on November 16, 1942 to determine whether or not the answer "No" given by Mr. Lutz was true or false?

A. There is no way of determining that other than to test out his reflexes for nervous sensations, and as far as a man being depressed, I had no way to test that. I tested his nervous reflexes and found them normal.

Q. You found his reflexes normal?

A. Yes, sir.

Q. Now, at the same time, Question 35: Did you inquire from Mr. Lutz relative to palpitation of the heart? A. Yes, sir.

Q. And what was his answer? A. No.

Q. Did you, as part of that examination, make any test to determine whether or not the answer given by Mr. Lutz was true or false?

Mr. Herndon: That is objected to, if your Honor please, upon the ground that it is immaterial. The only issue here is whether or not the insured truthfully answered the questions in the application. Unless there is a background showing that the answer had been truthfully given by [120] the insured to the medical examiner, the witness here was purely in misconduct to negligently fail properly to record the answer. Any other examinations or any other knowledge that the witness might have had or acquired in any way whatsoever would not be binding on the plaintiff under the authorities.

(Testimony of John M. Waste)

The Court: Let me see the application. Read the question.

(Question read by the reporter.)

The Court: Well, if the answer to that question were No, that will be the end of it; if it were Yes, then, of course, it might involve the integrity of the witness. It might be good impeachment, but you can't impeach your own witness.

The Witness: Your Honor, may I explain a little bit about these examinations?

The Court: Certainly.

A. This first page here that we are discussing now is the history as given to us by the applicant. These are his statements to me when I asked him the questions.

The Court: Let us modify that question in order that it be within the proprieties in connection with Question 35, Subdivision (f): Palpitation of heart. Did you make any independent examination?

A. May I explain what I wanted to say a moment ago? Yes, I did, but not at this time. [121]

Q. I particularly said in connection with that particular question, did you make any examination, or did you simply take his statement?

A. Do you mean did I do it at that time, or later?

Q. Yes.

A. Later, after we did this, we took him in the office, and we examined him.

Q. That is a different thing entirely. But, here you simply took his answer down, without at that time making any independent investigation, or previously having made an independent investigation? A. Yes.

The Court: The answer then would be No.

(Testimony of John M. Waste)

Q. By Mr. McGinley: Now, on the same day, November 16, 1942, and before you had completed with the physical examination of Mr. Lutz, did you make an independent test relative to palpitation of the heart?

A. Yes.

Q. And that examination was in the clinical part of your office establishment, at the address given?

A. Yes.

Q. Will you tell the court what examination or test you made relative to palpitation of the heart, and what your findings were?

A. We listened to his heart with our stethoscope; we feel the impulse, and we percuss it for enlargement, and [122] count the heart beats; whether they are regular or irregular.

Q. What were your findings on November 16, 1942, relative to the condition with respect to the palpitation of the heart of Abe Lutz?

A. No abnormal findings, if I remember.

Q. Can you refresh your memory by referring to the medical report which is on the reverse side of Plaintiff's Exhibit No. 2, relative to the tests made by you concerning palpitation of the heart?

A. Heart or blood vessels.—Any evidence of past or present diseases of? Answer: Heart or blood vessels, no.

Q. And that notation that you just read is from the medical report that you made to the plaintiff, insurance company, following your examination of Mr. Lutz on November 16, 1942? A. Yes.

Q. Again referring to Plaintiff's Exhibit 2. Question 35, and that portion (g) which refers to shortness of

(Testimony of John M. Waste)

breath, may I ask you, doctor, if, on November 16, 1942, you made an independent test in the clinical part of your offices to determine the condition of Abe Lutz with respect to shortness of breath? A. Yes.

Q. And will you tell the court what you did in making that examination or test, and what your findings were?

A. That test was made by listening to the lungs, count- [123] ing his respiration, and having him breath deeply and inhale and exhale. My answer to that is: Lungs or respiratory tract, any evidence or past or present disease?—My answer is: No.

Q. And having in mind, doctor, the age of Abe Lutz on November 16, 1942, as being 64, were your findings in regard to shortness of breath in your opinion normal?

A. Yes.

Q. Again referring to Question 35, and that portion opposite the letter (h) Pain or pressure in chest? Will you state whether on November 16, 1942 you made an independent test as part of the examination of Mr. Lutz with reference to pain or pressure in chest?

A. There is no real test or examination that we can give to tell whether a man has got pain in his chest or not, unless he tells us himself.

The Court: In other words, the answer is No.

A. No.

The Court: That is subjective matter.

Q. By Mr. McGinley: Referring to the division (e) of Question 35: Dizziness and fainting spells? Will you please tell us, doctor, on November 16, 1942, whether you made an examination of Abe Lutz with reference to dizziness or fainting spells?

A. We always have them stand and close their eyes, and see whether they sway or not. Looking at a person

(Testimony of John M. Waste)

you can [124] tell whether he is fainting or not. The answer is No.

Q. On November 16, 1942, what were your findings with regard to Abe Lutz in respect to dizziness or fainting spells? A. No is the answer.

Q. By the Court: Now, doctor, you don't mean to say just because he didn't faint while you had him standing with his eyes closed, that you can tell anything as to whether he had had fainting or dizzy spells in the past, can you?

A. No, that is not the question he put to me, I don't believe.

Q. What does the question state there? Read it.

A. This is his answer.

Q. Read the question.

A. It says: Have you ever suffered from dizziness or fainting spells? I asked him the question.

Q. The question is, Did you make any objective test to determine the correctness of the answer "No" to that?

A. Examination of his heart and pulse and blood pressure would indicate at that time he wasn't fainting, if that is what you mean.

Q. I am asking you what you mean.

A. I couldn't tell by examining a man now if I found his pulse normal and his blood pressure normal and his heart normal, whether he had fainted before.

Q. Exactly. In other words, by your answer you mean [125] that the only test is to determine whether at that particular time he had any dizziness or fainting?

A. That's right.

Q. But you did not make a test to determine whether it happened in the past? A. No, I did not.

(Testimony of John M. Waste)

Q. By Mr. McGinley: On November 16, 1942, did you make a blood pressure test, doctor?

A. Yes, sir.

Q. Did you report your findings to the plaintiff company in that connection?

A. It is all on the back; his answer and my findings on this.

Q. What was the blood pressure of Mr. Lutz on November 16, 1942?

A. Systolic pressure, 134; diastolic, 84 - 78.

Q. Having in mind the age of Mr. Lutz on November 16, 1942, in your opinion did his condition indicate a normal state of health? A. Yes, sir.

Q. And in your opinion did these tests indicate that Mr. Lutz was in a good state of health?

A. They indicated that his blood pressure was normal and his arteries apparently were normal, as far as the blood pressure is concerned.

Q. On November 16, 1942, in making the examination [126] relative to the heart and chest, did Mr. Lutz bare his chest? A. Yes.

Q. Tell the court what was done in making that examination to determine the condition of Mr. Lutz' heart, on November 16, 1942?

A. I examined him with our stethoscope to see if there are any murmurs. We percussed his heart, to see if there is any enlargement; we span the impulse of his heart, to see if it is within the normal range; we also listen to the heart beat.

Q. What findings with reference to the heart did you make on November 16, 1942, as part of the examination?

A. Heart and blood vessels normal.

(Testimony of John M. Waste)

Q. And having in mind that Mr. Lutz was 64 years of age, is it your opinion that his condition of health was good?

A. Yes; it appeared to me that his health was good at that time.

Q. In your medical report, I notice that a Romberg test was given Mr. Lutz on November 16, 1942.

A. Yes, sir.

Q. What purpose did you have in mind in giving the Romberg test?

A. The Romberg test is a test where the patient stands in front of you, or the applicant, closes his eyes and you watch to see whether he sways one way or the other, or not, to test his equilibrium. That is indicative, swaying from [127] one side to the other, or a positive Romberg, is indicative of some unusual nerve involvement of his spinal cord or central nervous system. That was negative.

Q. The results of the Romberg test were negative?

A. Negative, yes.

Q. I notice in the medical report that was furnished to plaintiff insurance company that you note the expansion and depression of the chest on respiration, is that right, doctor? A. Inspiration and expiration.

Q. What purpose did you have in mind in making that test?

A. To test the lung capacity of the applicant, as to whether or not he had full inspiration or whether or not it would indicate—in other words, a slight inspiration, a slight difference between the two would indicate probably some lung involvement, but when he has a full inspiration and a normal expiration, with a difference between the two, we will say from two and a half to four inches, then we would consider that his lung capacity is normal.

(Testimony of John M. Waste)

Q. Is that the condition that in your opinion Mr. Lutz was in on November 16, 1942, that is, being normal for his age?

A. Inspiration 41; expiration 37½, which indicates a normal respiratory movement.

(Short recess.) [128]

Q. By Mr. McGinley: Doctor, again referring to Question 35, subdivision (d): Overwork, to which an answer No is noted. Can you refresh your memory from this application, and give us the substance of the conversation you had with Mr. Lutz about overwork?

A. Well, I asked him these questions, and asked him if he had been overworked, and he said No.

Q. And the manner in which you stated the question, is that the way you put it to him, Dr. Waste?

A. Yes, I asked him if he had suffered from overwork.

Q. And with regard to subdivision (b) to Question 35, will you state how you put the question of Mr. Lutz with reference to insomnia?

A. I asked him if he slept well. He said Yes. That answer would be No for insomnia.

Q. On November 16, 1942, when you made this examination, did you have a conversation with Mr. Lutz about indigestion? A. I asked him that question.

Q. As nearly as you can recall what did you say, doctor, to Mr. Lutz about indigestion?

A. I asked him if he had ever suffered from indigestion or had any pains in his stomach or bowels, and the answer was No.

Q. Doctor, in noting the No answer to the various subdivisions of Question 35, you did not put down the entire answer of Mr. Lutz, did you? [129]

(Testimony of John M. Waste)

Mr. Herndon: If your Honor please, that is objected to on the ground that the application itself shows what was placed thereon.

The Court: I think so. He has answered as to each question categorically, and this is just self-evident.

Q. By Mr. McGinley: In regard to Question 32, Dr. Waste, which is as follows: In the last two years how much has your weight increased? And then a blank space. Then the word Decreased. Will you state the manner in which you asked that question, and the full response of Mr. Lutz?

A. We asked him if his weight—if he had gained in weight or lost weight within the last two years, and his answer was a decrease of about 15 pounds.

Q. Is that all he said?

A. I don't remember of his saying anything else. There is an explanation to that in Question 71.

Q. What question was that?

A. 71, on confidential information.

Q. You are referring now to the medical report to the insurance company? A. Yes.

Q. Does the explanation that you are about to give refer to information given to you by Mr. Lutz on November 16, 1942?

A. That is possibly his conversation leading up to his [130] answer of a decrease of 15 pounds.

Q. What was the conversation in that respect, doctor?

A. I would have to quote my answer from the beginning. I can read that again to you: A change in weight gradual. Last summer realized he was getting too heavy so began cutting his diet, and doing a little more active work. No change in weight for three

(Testimony of John M. Waste)

months. He looks well.—That's my comment to that remark.

Q. Doctor, can you state whether you recall his giving any reason as to why he was too heavy on November 16, 1942?

A. I believe I discussed it with him a little bit. I did not write it down, because I thought it was immaterial. I believe he had taken a trip east, or on a vacation, or something, and he had rested a great deal, and he had had a lot of good meals, and came back with a few pounds more than he should have weighed, or he thought he should have weighed, and I think this is the reduction back to normal, probably to take off the weight he had gained on his trip. I believe that is the conversation I had with him.

Q. Did you make a urine test? A. Yes.

Q. For sugar or albumen, on November 16, 1942?

A. Yes.

Q. Will you tell the court, as nearly as you can recall, and if it is necessary, doctor, to refresh your memory from anything that appears in the document before you, the full [131] conversation you had with the decedent relative to sugar or albumen in the urine?

A. We asked him that question. That is one of the questions here, if he ever had albumen or sugar in his urine. The answer that he gave to that was Yes. We analyzed it ourselves, but on this examination at this time I did not find any sugar. Specific gravity of urine 1018. That is considered normal. [132] Albumen, none; sugar, none. That was on our chemical analysis, in our laboratory.

(Testimony of John M. Waste)

Q. Have you given us, as nearly as you can recall, everything that was said by the decedent relative to the urine test?

A. Well, Mr. Lutz had had a history of diabetes, and had been rejected from life insurance on account of having sugar in his urine, on previous examinations, and naturally I knew that and I probably discussed that with him a little bit. That might have been some of my conversation at that time, because I had examined him several times before this. I think you can find that record probably.

Q. Will you state whether the deceased told you that he had had a urine test made by Dr. Maurice H. Rosenfeld? A. Yes, sir.

Q. What did he say with reference to Dr. Maurice H. Rosenfeld on November 16, 1942?

A. That question is answered in 44: Dr. Maurice H. Rosenfeld, August, 1942. This is what he told me; physical examination and blood sugar determination. Report which was normal.

Q. Did the deceased tell you that the blood sugar test was normal, or did you arrive at that conclusion from your own analysis of the urine specimen?

A. I hadn't made the examination of the urine at this time. That came later. That was the report that he told me [133] it was normal.

The Court: Is that your handwriting?

A. That's my handwriting, but this is on the history side.

Q. His address, 1908 Wilshire Boulevard?

A. Yes.

Q. Did you just fail to put in "Wilshire Boulevard"?

A. That's right.

(Testimony of John M. Waste)

Q. You did not make an error; you just failed to put in "Wilshire Boulevard"? A. I omitted it, yes.

Q. By Mr. McGinley: At the time you made the examination of Mr. Lutz on November 16, 1942, state whether you knew that Maurice H. Rosenfeld was a heart specialist, doctor?

Mr. Herndon: I object to that as immaterial; no foundation laid, and not binding on the plaintiff.

The Court: Objection sustained.

Q. By Mr. McGinley: Have you give us, doctor, the conversation as best you can remember, with Abe Lutz, relative of his having seen Dr. Maurice H. Rosenfeld? A. Yes, as nearly as I remember.

Q. The court has suggested that the full address of the doctor was not listed on your item 44. Does that refresh your memory as to whether or not Mr. Lutz said that he had consulted Dr. Maurice H. Rosenfeld at 1908 Wilshire Boulevard? [134]

A. No, that's the office address of the doctor he consulted.

Q. From whom did you get the office address of Dr. Maurice H. Rosenfeld?

A. I knew it. That's where his office was.

Q. And you note under 44, special information: Physical examination and blood sugar determination.

A. Yes.

Q. Will you state whether there were two items of information given to you by the deceased? A. Yes.

Q. They were—

A. Physical examination and blood sugar determination. Blood sugar determination is a laboratory test, and it is really not considered a physical examination.

(Testimony of John M. Waste)

Q. I did not get the last remark, doctor.

A. Physical examination. I understood from him that he had a physical examination by the doctor, and also had a blood sugar determination test.

Q. When Mr. Lutz said that he had a physical examination, did he tell you when he had that examination?

A. I got the date August, 1942. That was the best he could remember, I guess.

The Court: That was the date of both the blood sugar test and the physical examination? A. Yes, sir. [135]

Q. By Mr. McGinley: When the deceased said that he had a physical examination by Dr. Maurice H. Rosenfeld in August, 1942, did you inquire from the deceased the details of the physical examination?

A. He said he had a general physical examination, checked his heart, blood pressure, and listened to his chest, which is understood usually when you say a physical examination.

Q. Now at that time, Dr. Waste, when he said that he had had his heart checked and a physical examination by Dr. Maurice H. Rosenfeld, did he tell you what Dr. Rosenfeld had said? A. No, sir.

Q. And did you ask him what Dr. Rosenfeld had found with reference to his general physical condition and his heart?

A. I asked him what was the result of the examination, and he said the report was normal.

Q. And you understood that as referring both to the blood sugar determination test as well as the general physical examination? A. Yes, sir.

Q. In noting the special information under question 44, did you ask Mr. Lutz when he was last consulted by

(Testimony of John M. Waste)

Dr. Rosenfeld, or the times that he had been consulted by Dr. Rosenfeld? [136] A. I have August, 1942.

Q. Did that refresh your memory, doctor, as to whether you asked the deceased when he last had seen Dr. Rosenfeld, or if he had had a number of consultations with Dr. Rosenfeld?

A. I believe this was the last time that he had consulted a doctor.

Q. And that was the purpose of your making the written memorial: Dr. Maurice H. Rosenfeld, August, 1942? A. That's right.

Q. What was the weight of the deceased on November 16, 1942? A. 180 pounds.

Q. In making the medical report to the plaintiff company, following the examination of Mr. Lutz on November 16, 1942, did you make any recommendations as to Mr. Lutz in your opinion being an insurable risk?

Mr. Herndon: If your Honor please, that is objected to upon the ground that the report of the medical examiner speaks for itself.

The Court: Objection sustained.

Q. By Mr. McGinley: In your opinion, doctor, on November 16, 1942, having in mind the age of the deceased, was he an insurable risk for insurance?

A. Yes.

Q. In making the medical report to the plaintiff company, following your examination, did you rely on any [137] examination you had acquired prior to November 16, 1942, with reference to the health and condition of the deceased?

Mr. Herndon: That is objected to, if your Honor please, as being immaterial. The only material matter is

(Testimony of John M. Waste)

what the examination—what the answers were of the insured, and what the report of the medical examiner was as made to the plaintiff.

Mr. McGinley: If I may state my purpose: In the medical report that was forwarded to the plaintiff company, in the space provided for Comments, the opinion of the doctor regarding this risk, he recites the fact that the deceased had recently been either examined or granted a policy in the Equitable Life, and the purpose of my question is to show that in making that statement in the medical report to the plaintiff company, of necessity it would refer to the examination that the doctor had made in connection with that statement.

The Court: Will you read the question, Mr. Reporter?

(Question read by the reporter.)

A. No.

Mr. McGinley: That answers that.

Q. Referring to the medical report, and particularly to the recital that the applicant had been granted a policy, does that refresh your memory as to whether you based your report to the plaintiff company on information that had been acquired prior to November 16, 1942? [138]

A. I answered that.

The Court: Hasn't he already answered that question? He says that he got the information on that day: in other words, Mr. Lutz told him he had been accepted by the Equitable, and he put it in the report. He said he did not base it on anything other than what he acquired at the time of this examination, is that correct?

A. Yes, sir. He gave me that statement on the history side.

(Testimony of John M. Waste)

Q. By Mr. McGinley: Doctor, how long in the matter of time, did your examination of Mr. Lutz take, on November 16, 1942?

A. The average is about a half an hour, for the physical examination.

Q. And it would be your judgment that that examination lasted that long?

A. About a half an hour, yes, sir.

Q. Does that include the answering of questions as well as the clinical examination that you made, Doctor?

A. Yes, sir.

Q. After you had completed interrogating the deceased, will you describe what you did with Plaintiff's Exhibit 2, being the application, Part 2?

A. Do you mean after we had finished the history?

Q. Yes.

A. I think I told you that; examined the heart, and [139] the taking of his respiration.

Q. After you had finished that, Doctor? I did not make my question clear.

A. After I had examined him, and checked his respiration, we palpitate his stomach, usually feel to see if he has got any tumorous masses, tender spots, and we test his reflexes and look over, for deformities, the bones, spine, and look at his mouth usually to see if he has an inflamed throat. We usually find by talking to him whether he is deaf or not, before we are through the examination, and we examine his eyes, his vision. I believe he wore glasses, and he had a normal correction. I believe he said, in his eyes. We examined him, to look to see if we can find anything abnormally wrong with him, so we can report it in our confidential information on the back of our medical report.

(Testimony of John M. Waste)

Q. The medical report, which is on the reverse side of the application, that is not exhibited to the applicant, is that right, doctor? A. No, sir.

Q. That is something that is confidential, between yourself, as examining physician, and the home office of the plaintiff company? A. Yes, sir.

Q. Will you describe to the court the manner in which you handed the application to the deceased to obtain his signature? [140]

A. After we have completed all the questions that we usually ask him if that is all his history he has, and if they say yes, that is all; if they say no, then we add it. Then we turn this around, and ask him if he will sign this now, on his history; we turn it around like this. He has the privilege of looking it over, and then signs it.

Q. What was done in this case, doctor, was the routine that you have just described, which you followed with reference to obtaining the signature of Mr. Lutz?

A. Yes, sir.

Q. Is there any portion of the application, part 2, Plaintiff's Exhibit 2 in evidence, which you would use, on November 16th, to note the source of information to the answer given in 35?

A. Repeat that again, please?

Q. Kindly read it.

(Question read by the reporter.)

Mr. Herndon: That is objected to, your Honor, upon the ground that it is unintelligible.

The Witness: I can't understand the question.

The Court: Objection sustained.

Mr. McGinley: That is all the examination.

(Testimony of John M. Waste)

Cross-Examination

Q. By Mr. Herndon: Is it not a fact, Dr. Waste, that a man may suffer from a serious disease of the heart and the circulatory system, which will not be disclosed by an ordinary [141] physical examination such as you state you made in the case of Mr. Lutz?

A. I don't understand what you mean by serious. There are so many different kinds of heart condition.

Q. I will ask it this way: Is it not a fact, Dr. Waste, that a patient may have arteriosclerosis, and that disease will not be disclosed by subjective manifestations observable on such examination as you state you made in the case of Mr. Lutz?

A. Do you mean regarding the heart alone, in that examination?

Q. Yes. A. Will you state it again now?

Q. Will you read the question, Mr. Reporter?

(Question read by the reporter.)

Mr. Herndon: May I amend the question? I mean objective, instead of subjective.

A. Read the question.

(Question read as follows: Is it not a fact, Dr. Waste, that a patient may have arteriosclerosis, and that disease will not be disclosed by objective manifestations observable on such examination as you state you made in the case of Mr. Lutz?)

The Court: Do you mean a single examination? Just one examination?

Mr. Herndon: Yes. [142]

A. Might not be revealed?

Q. That's right. A. Yes.

Q. Is it not true, Dr. Waste, that a patient may be suffering from angina pectoris, and yet a doctor on mak-

(Testimony of John M. Waste)

ing such an examination as you state you made in the case of Mr. Lutz will not find the existence of that disease by objective manifestations? A. Yes.

Q. Doctor, assuming that a patient suffered from dizziness and vertigo in January of 1937, to such an extent that the patient was unable to arise from his bed; that in January, 1937, the patient was found to have ruptures of the small vessels in the posterior portion of the eye; that on June 1, 1942, the patient complained of having suffered pain in the chest; that again, in August, 1942, the patient had suffered from pain in the chest, and that on two occasions during the period between January 1, 1942 and November 1, 1942, the patient had suffered gas pains,—would you say that such patient was in good health and an insurable risk?

Mr. McGinley: That question, your Honor, is objected to upon the following grounds: First, it is not proper cross examination; secondly, it is a hypothetical question which assumes facts not in evidence, in that the recital of the basis for that hypothet is based upon testimony which has been previously objected to as being privileged and hearsay. [143]

The Court: As I have said many times before, the question does not need to contain all the elements. It seems to me it is proper cross examination, because of the scope of the direct examination. You asked the witness if the man was in good health; you asked him whether at that time he was an insurable risk. Now, on cross examination, he is asking him in effect, if he would have been in good health, or a good insurable risk, if these other things had been present. You may answer.

A. I want you to say it again.

(Testimony of John M. Waste)

Q. By Mr. Herndon: Will you read the question, Mr. Reporter?

(Question read by the reporter.)

A. No.

Q. By the Court: If the patient had told you these things as part of his history, or any part of them, would you have written them down on the chart as part of your comment? Would you have made a note of them?

A. Yes, sir.

Q. By Mr. Herndon: Assume, Doctor, that a patient had suffered from dizziness and vertigo in January of 1937, to an extent that he was unable to arise from his bed; that in June of 1942 the patient consulted a physician, complaining of pain in the chest, and that on the occasion of such consultation, and after making an examination, including the taking of an electrocardiogram, the physician prescribed [144] nitroglycerine; that in July of the same year, 1942, the patient was again examined by a physician, and as a part of the examination an electrocardiogram was taken; that in August of 1942, after examination was made by the same doctor, at that time the patient complained of having suffered pain in the chest, and was advised to continue to take nitroglycerine tablets,—would it be your opinion that such patient would be considered an insurable risk in November of 1942?

Mr. McGinley: That question, your Honor, is objected to on the ground that the hypothetical question assumes facts not in evidence, in that the facts assumed as a basis for the hypothet, at this stage, is a privileged communication, and constitutes hearsay as far as the counter-claimant is concerned.

(Testimony of John M. Waste)

The Court: We will take the evidence subject to a motion to strike, pending the ruling on that particular question. Is that your understanding?

Mr. McGinley: Yes, your Honor.

The Court: The ruling will be the same. You may answer.

A. Would he be considered a good risk, did you say?

Mr. Herndon: Yes.

A. No.

Q. When you expressed the opinion, in response to a question by counsel for the defendant, that Mr. Lutz was in good health on November 16, 1942, you based that opinion [145] entirely, did you not, upon your examination on that date, and the history related to you by Mr. Lutz? A. Yes.

Q. In the course of your examination of Mr. Lutz, on November 16, 1942, did you test his eyes?

The Court: I don't know that that is quite an intelligible question. He said that he tested his eyes for vision, but do you mean did he make an examination of them with an instrument to determine what the condition was as to blood clots, and so forth?

Mr. Herndon: I intended to ask him if he tested his visual acuity, your Honor.

The Court: He can answer that easily.

A. What date was that?

The Court: The date of the insurance examination, on November 16, 1942.

A. I probably did. I have answered that question: Eye or middle ear diseases? None. I apparently tested his vision.

(Testimony of John M. Waste)

Q. By Mr. Herndon: Isn't it a fact, Dr. Waste, that you tested Mr. Lutz's eyes on November 16, 1942, making use of the Snelling and Jaeger test charts?

A. I believe I did. I knew he wore glasses. I believe I checked his vision with glasses to be 20/20, corrected with glasses.

Mr. Herndon: May I show this to counsel, your Honor? [146]

Q. I have shown counsel, and I now show the witness a card with the statement at the bottom: Jaeger's test types, and I will ask you whether or not you recall using this chart which I now hand you, in making your test of Mr. Lutz's eyes on November 16, 1942?

A. Yes; we have a little different form, but it is the same test.

Q. On the card that you used in the case of Mr. Lutz were all of the same printing?

A. Not quite so fine. We run from about No. 3, we call it, 3 to 10. It is about that same size as the fine print on those forms.

Q. The card that you used in the case of Mr. Lutz had on it the printing the size of Nos. 3 to 10?

A. Yes, sir, about that. That's a little card they put out, I suppose, to carry around with you. I don't know. We have a big chart that we have them read.

Q. Tell us, using the card which I have handed you for illustration, how you tested Mr. Lutz's eyes with that card.

A. We just hold it in front of him, or let him hold it, and he tells us which one of these letters or numbers of the type that he can see.

(Testimony of John M. Waste)

Q. Did you ask the patient, or did you ask Mr. Lutz to read any of the writing appearing on the card?

A. Asked him what letter that is, and what letter that [147] is.

Q. What were your conclusions as to his vision, after having made the test?

A. I concluded he could see letters of normal reading size.

Mr. Herndon: At this time, if your Honor please, I will offer in evidence the chart.

The Court: It may be received to explain the testimony of this witness.

The Clerk: Plaintiff's Exhibit 28.

The Court: Any further questions?

Mr. Herndon: No further questions, your Honor.

The Court: Any further redirect?

Mr. McGinley: Nothing further. [148]

* * * * *

HOWARD L. HARRIS.

a witness called by and on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: You may state your name, please.

A. Howard L. Harris.

Direct Examination

Q. By Mr. Herndon: Where do you reside, Mr. Harris? A. I live in San Marino, California.

Q. By whom are you employed?

A. The Equitable Life Assurance Society of the United States.

Q. In what capacity are you employed?

A. As a claim investigator.

(Testimony of Howard L. Harris)

Q. How long have you been employed in that capacity? A. Since August 1, 1942.

Q. In the course of your employment did you ever have occasion to investigate the case of Abe Lutz with respect to the cause of his death? A. I did, yes.

Q. I will now show you Plaintiff's Exhibit No. 11, and ask you whether or not you have previously seen that document? A. Yes, I have.

Q. Did you ever have that document in your possession? A. Yes, I did.

Q. From whom did you receive it? [15]

A. These documents, authorizations, are sent to us in the claim department through the cashier's office.

Q. Did you, in the course of your investigation interview Dr. Maurice H. Rosenfeld? A. I did, yes.

Q. Will you state whether or not you exhibited to Dr. Rosenfeld Plaintiff's Exhibit No. 11 at the time you consulted him?

A. Yes, I did, I presented an authorization to Dr. Rosenfeld.

Q. Do you know whether or not it was Plaintiff's Exhibit No. 11, or whether it was a document containing the same material? A. I don't know.

Q. Do you remember by whom it was purported to be signed? A. By Harry Lutz.

Q. Will you state the substance of what was said in the course of your interview with Dr. Rosenfeld?

Mr. McGinley: If your Honor please, the defendants object to the conversation between Dr. Rosenfeld and this gentleman on the following grounds: First, that such testimony would be hearsay, and not part of the res gestae, and therefore, not binding on the defendant Harry Lutz; secondly, there has been no foundation laid that

(Testimony of Howard L. Harris)

would make competent the disclosure of testimony from Dr. Rosenfeld for [16] the reason that it affirmatively appears during the time in question Dr. Rosenfeld was a physician, and the deceased, Abe Lutz, was his patient, and under Sec. 1881, sub 4 of the California Code of Civil Procedure, such testimony would be incompetent and privileged; third, the purported authorization has not been shown to be binding on the deceased, Abe Lutz, in that the privilege under Sec. 1881, sub 4, is personal to the patient, and the foundation laid as far as it goes purports to show a waiver by Harry Lutz, son of the deceased, and, lastly, there has been no proper foundation showing that this witness is acquainted or familiar with the signature of Harry Lutz, and also, if I may add this, your Honor, it appears from the exhibit for identification, the purported waiver authorizing the disclosure of the information from Dr. Rosenfeld is a limited, and not a general, waiver, and is directed to the Equitable Life Insurance Company, and not to the New England Mutual Life Insurance Company, the plaintiff in this action.

Mr. Herndon: I am concerned with one element of the objection primarily, at this time, your Honor, and I wonder if I might properly ask counsel if it will be stipulated that the signature of Harry Lutz, whether the purported signature of Harry Lutz on the authorization, Plaintiff's Exhibit No. 11, is genuine, or whether it will be necessary to call Mr. Harry Lutz to ascertain that preliminary fact.

The Court: You may ask him. [17]

Mr. McGinley: May I show this to Mr. Lutz, who is in court? If he says it is his signature I will so stipulate. In response to counsel's request, your Honor, the defend-

(Testimony of Howard L. Harris)

ant stipulates that the signature appearing on Exhibit No. 11 for identification is the signature of Harry Lutz.

Mr. Herndon: May I ask one or two questions preliminary to the question now pending?

Q. Will you state whether or not you left a copy of an authorization containing material which is contained in Plaintiff's Exhibit No. 11 at the Cedars of Lebanon Hospital?

A. I left an authorization there. If I can see it to refresh my memory?

Q. Now, I show you Plaintiff's Exhibit No. 11, and I will ask you whether or not that appears to be identical with the document which you left at the Cedars of Lebanon Hospital? A. Yes, sir.

Mr. Herndon: The plaintiff will now submit to your Honor's ruling on the previous question.

The Court: May I see the document, please? How are you going to get around the hearsay phase of this matter?

Mr. Herndon: The sole purpose of the offer of evidence, your Honor, is simply this: To show that with the authorization signed by the defendant and counter-claimant, Harry Lutz, waiving privileged, this witness went to Dr. Rosenfeld and to the Cedars of Lebanon Hospital, and was given all of the [18] information which is now claimed to be privileged. The materiality of it, as we view it, is established.

(Discussion.)

The Court: Will you be willing to stipulate that Harry Lutz, the son of the decedent, and beneficiary under the policy in suit, signed and delivered this waiver to the representative of the Equitable Life Insurance Company on or about June 7, 1944?

(Testimony of Howard L. Harris)

Mr. McGinley: Yes, your Honor, I so stipulate.

The Court: With that stipulation it may be received for what it is worth. Clearly, the information that he gained from Dr. Rosenfeld would be hearsay, and would not be binding on the defendant.

Mr. Herndon: I think this inquiry could be very largely shortened, your Honor, by a stipulation that this witness would testify that he went to Dr. Rosenfeld's office, and that Dr. Rosenfeld did disclose to him the fact that he was consulted by the insured, and treated him, and revealed in a general way the matters to which the doctor has testified; not all of the matters, but he revealed certain of the matters, and his diagnosis, and he also revealed to this witness the fact that he had taken electrocardiograms; and that substantially would be what the witness would testify the doctor told him.

The Court: I don't imagine the defendant would enter into such stipulation. I would not ask him to, but it seems [19] to me, as far as we can go would be to state that information was actually given by Dr. Rosenfeld to the witness under this waiver. Would you stipulate that far?

Mr. McGinley: Yes, your Honor, I will stipulate to that.

The Court: That is as far as we can go. The stipulation will be received.

Mr. McGinley: May I address the court? May I ask counsel, so as to obviate further interrogation of this witness, if he would be willing to stipulate to these facts: That the adjuster, Mr. Harris, for the Equitable Life Insurance Company, obtained the authorization which has just been referred to, in connection with the claim of Harry Lutz, in a policy of insurance, in which he was

(Testimony of Howard L. Harris)

named beneficiary, and the Equitable Life Insurance Company was the insurer, and that pursuant to investigation made by this gentleman the policy, the full amount of the policy, was paid?

The Court: You think that over while we take a five minute recess.

(Short recess.)

Mr. Herndon: We would respectfully decline from the proposed stipulation, if your Honor please.

The Court: Very well.

Q. By Mr. Herndon: Mr. Harris, will you state the substance of what was told you by Dr. Rosenfeld on the occasion that you went to his office, as you have previously [20] testified?

Mr. McGinley: If your Honor please, the conversation is objected to, or the substance of the conversation is objected to, upon the ground that it is hearsay, and not binding on the defendant; two, that it calls for the disclosure of information which would be privileged under Sec. 1881 of the Code of Civil Procedure, sub 4; therefore, it is incompetent; and that it affirmatively appears that Dr. Rosenfeld at the time in question was a physician of Harry Lutz, and that he was the patient, and such information as is called for by the question, being information pursuant to a limited waiver as distinguished from a general waiver, is incompetent, under Sec. 1881, subdivision 4.

The Court: The objection will be sustained. It is clearly hearsay. If it is done for the purpose of impeachment, one cannot impeach their own witness; otherwise it would be merely cumulative. There is nothing to show this witness would testify any differently than the witness Dr. Rosenfeld testified.

(Testimony of Howard L. Harris)

Mr. Herndon: It is offered for the sole purpose, your Honor, of proving that the information was communicated; not to prove it is true.

The Court: I understand that has already been admitted by counsel for the defendants.

Mr. Herndon: I thought counsel declined to stipulate.

The Court: No, he admitted it, I understand. [21]

Mr. McGinley: Yes, your Honor, for the purposes stated by the court, I stipulated.

Q. By Mr. Herndon: State whether or not you were shown the records at the Cedars of Lebanon Hospital, which I now show you, being Plaintiff's Exhibit No. 8.

Mr. McGinley: May I urge the same objection, your Honor, and on the further ground that it would be immaterial in view of the stipulation.

The Court: I think it is conceded that he was shown it, by the stipulation. Is that not true?

Mr. McGinley: Yes, your Honor, for the purposes stated.

Mr. Herndon: Then I will withdraw the question. In conferring with my associate, your Honor, the question is in our minds whether the stipulation is broad enough to include the fact that Dr. Rosenfeld did disclose to this witness that he had made certain examinations, and the substance of his declarations. In other words, it is of no avail to us to stipulate that he told him something, unless the stipulation is broad enough to show that the doctor disclosed to the witness matters relating to the health of the insured; that is to say, some of the matters here at least claimed to be privileged.

The Court: It is my understanding of the admission that naturally the doctor did disclose his findings with regard to the patient. What the actual statement was, would be hearsay, is that not correct? [22]

(Testimony of Howard L. Harris)

Mr. McGinley: Yes, your Honor; my basic objection is that anything that Dr. Rosenfeld would say would be hearsay as to Harry Lutz, in this suit.

The Court: That is right.

Mr. Herndon: Very well; if counsel's understanding of the stipulation is that your Honor has indicated, we are satisfied, and counsel may cross examine.

Cross-Examination

Q. By Mr. McGinley: Mr. Harris, how long have you been employed by the Equitable Life Insurance Company? A. Since August 1, 1942.

Q. Since August 1, 1942? Will you please tell us what your duties have been?

A. I am a claim investigator, handling the general checking of disability claims, accident and health claims, investigating on death claims, and working on disappearance cases.

Q. Part of your duties pertain to the investigation of death claims, I understand? A. Yes, sir.

Q. When was the matter of the claim of Abe Lutz referred to your attention?

A. May I refer to my file?

The Court: Anything that you have, any memorandum of what happened at the time of the occurrence, you may refer to it. [23]

A. June 7, 1944, I received the first communication from our home office.

Q. By Mr. McGinley: Pursuant to that communication from your home office did you procure, through the Equitable Life Insurance Company, an authorization from Harry Lutz to investigate the claim made on account of the death of his father?

(Testimony of Howard L. Harris)

A. I never did procure the authorization.

Q. You were handed it by some other person in the organization? A. That's right.

Q. And the document that you were handed was the authorization dated June 7, 1944?

A. I did not understand that.

The Court: The document that you were handed is Exhibit 11? A. Yes, sir.

Q. By Mr. McGinley: Can you refresh your memory from your file, Mr. Harris, and give us the date of the Equitable Life policy, under which Harry Lutz was named beneficiary?

Mr. Herndon: If your Honor please, I object to that upon the ground that it is immaterial, and has no bearing on any issue here. It is beyond the scope of the direct examination, and, therefore, is immaterial.

The Court: It seems to me that that is so. I don't think it would be proper cross examination to go into the [24] policy if it were not within the scope of the direct examination.

Mr. McGinley: The authorization dated June 7, 1944, your Honor, has been admitted subject to the stipulation that is in the record. The stipulation is that it contains the original signature of Harry Lutz. If this witness knows, I want to show the circumstances under which the authorization was obtained.

The Court: He says he didn't get it, so he doesn't know anything about it. As I understand it, you know nothing about the circumstances under which it was obtained? A. That's right.

The Court: That was the reason for the sustaining of the objection.

(Testimony of Howard L. Harris)

Q. By Mr. McGinley: Did you exhibit the original authorization dated June 7, 1944, to Dr. Rosenfeld?

A. I believe, sir, there were three authorizations of this type, the same type of authorization.

Q. Were they all originals, Mr. Harris?

A. Yes, sir.

Q. Did you leave an original authorization with Dr. Rosenfeld? A. Yes, sir.

Q. Was there an original authorization retained in your file? A. No, sir. [25]

Q. What did you do with the other three authorizations?

The Court: The other two?

Q. By Mr. McGinley: The other two; pardon me.

A. One of the other authorizations was presented to Dr. Rosenfeld for countersignature, or confirming signature, and presented to the Cedars of Lebanon Hospital, where it is still on file with the chart, I presume. The third one was presented to the Sansum Clinic, or the Cottage Hospital, Santa Barbara.

Q. On what date did you complete the investigation made for the Equitable Life Insurance Company?

A. My last report is dated August 4, 1944.

Q. And, Mr. Harris, do I summarize fairly the discharge of your duties in connection with this authorization, when I say that everything that you did in connection with the investigation of the health of Abe Lutz, deceased, was done in connection with the claim being made for the proceeds of the policy with the Equitable Life Insurance Company, by which you were employed? A. Yes.

Mr. McGinley: That is all, your Honor.

The Court: Any further questions?

Mr. Herndon: No further questions. [26]

* * * * *

PAUL M. ARNOLD,

a witness called by and on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please?

A. Paul M. Arnold.

Direct Examination

Q. By Mr. Herndon: Where do you reside, Mr. Arnold? A. Los Angeles.

Q. What is your business or occupation?

A. Insurance inspector and investigator.

Q. By whom are you employed?

A. The Retail Credit Company.

Q. How long have you been so employed?

A. Since May 1, 1926.

Q. Did you ever have occasion to investigate the case of Abe Lutz? A. Yes, sir, I did.

Q. When was that?

A. It was the last week in June, 1944.

Q. Do you know by whom you were employed to make that investigation? A. Yes, I do.

Q. By whom?

A. The New England Mutual Life Insurance Company of Boston, Massachusetts.

Q. In connection with your investigation, Mr. Arnold, [27] were you given any authorization purporting to bear the signature of Harry Lutz? A. I was.

Q. May I see the exhibit? I will show you exhibit, Plaintiff's Exhibit No. 9, and ask you if that appears to be one of the authorizations that you stated you had?

A. It does.

Q. From whom did you receive that authorization?

A. I did not obtain that myself. As I remember it, that came from our company.

(Testimony of Paul M. Arnold)

Mr. Herndon: May I show this to counsel?

Mr. McGinley: May I show this to Mr. Lutz?

The Court: Surely.

Mr. McGinley: The defendants will stipulate that the signature of Harry Lutz, appearing on the document, dated June blank, 1944, is the signature of Harry Lutz.

Mr. Herndon: I will ask to have the document marked for identification.

The Court: It may be received and so marked.

The Clerk: Defendants' No. 20.

Q. By Mr. Herndon: After the receipt of this authorization, will you state what you did in connection with your investigation?

A. I contacted Dr. Rosenfeld, as the first step, and the Cedars of Lebanon Hospital.

Q. Did you exhibit any authorization to Dr. Rosenfeld [28] in connection with your conference with him?

A. I did.

Q. Did you exhibit one of these authorizations to anyone at the Cedars of Lebanon Hospital?

A. Yes, I did.

Q. I will now show you Plaintiff's Exhibit No. 20 for identification, and ask you whether that appears to be identical with one of the authorizations that you had at the time you made your investigation? A. It does.

Mr. Herndon: At this time, we will offer Plaintiff's Exhibit No. 20 for identification in evidence.

Mr. McGinley: If your Honor please, the defendant objects to the document on the same grounds that were urged in the objection to the document on the testimony of Mr. Harris, and I would be willing to stipulate that the same ruling applies, your Honor.

(Testimony of Paul M. Arnold)

The Court: Very well; the same ruling. It may be received. This is the document that you delivered to Dr. Rosenfeld, and also to the Cedars of Lebanon Hospital?

A. Yes, sir.

The Court: Exhibit 20.

Q. By Mr. Herndon: Do you recall having left one of these authorizations at the Cedars of Lebanon?

A. Yes, sir.

Q. Do you recall whether or not you left your card [29] with the person in charge of the records at the Cedars of Lebanon Hospital?

A. I might have; I don't recall.

Mr. Herndon: I wonder, your Honor, if time might not be saved by entering into the same stipulation with respect to the substance of the conversation between this witness and Dr. Rosenfeld, that was entered into in respect to the witness Harris and his conversation.

The Court: I think we might have the same stipulation. My understanding of the stipulation is that he interviewed Dr. Rosenfeld, and that Dr. Rosenfeld answered his questions with regard to the decedent's health and condition. May it be so stipulated?

Mr. McGinley: So stipulated, your Honor.

The Court: It is my view that you can't go into that, because it is hearsay, and not impeachment.

Mr. Herndon: That is all, your Honor.

(Testimony of Paul M. Arnold)

Cross-Examination

Q. By Mr. McGinley: Mr. Arnold, are you regularly employed by the New England Mutual Life Insurance Company?

A. No, sir, I am not. Our company does work for all the insurance companies.

Q. I presume the first mention that was made to you of an investigation of Abe Lutz was in June, 1944?

A. Yes, sir.

Mr. McGinley: That is all. [30]

* * * * *

Mr. Herndon: If your Honor please, we had expected that the defense case would take most of the afternoon, but we do have one rebuttal witness who is going to be read at 3:00 o'clock. It might be that counsel will stipulate.

The Court: Suppose you talk with him during the recess, and see if you can get a stipulation.

(Short recess.)

Mr. Herndon: If your Honor, please, during the recess I discussed with counsel for the defendants the matter of the deposition of Harold Morgan. It appears that the original has not been filed, or made available, and we have agreed, subject to the approval of the court, that a copy might be received in evidence, subject to our objections and [198] motions to strike, and thereby

(Testimony of Paul M. Arnold)

avoid the necessity of the court reporter transcribing all of it.

The Court: Very well. So permitted. Let it go in as defendants' next in order.

Mr. Herndon: Is that agreeable with counsel?

Mr. McGinley: Yes.

The Clerk: Exhibit P. Is that in evidence?

The Court: It goes in evidence, subject to the motions directed against parts of it.

Mr. Herndon: I have in my hand, your Honor, photostatic copies of two documents, the first being headed: New England Mutual Life Insurance Company, Boston, Massachusetts, general agency contract, made and entered into at Boston, Massachusetts, this 28th day of June, 1938, by and between New England Mutual Life Insurance Company of the City of Boston and Commonwealth of Boston, of the first part, and Rolla R. Hays, Sr., Rolla R. Hays, Jr., and Raymond H. Bradstreet, of Los Angeles, California, doing business under the firm name of Hays & Bradstreet, second parties; and supplementary agreement, dated the 28th day of June, 1938, between the same parties. Counsel has indicated that they will stipulate that the documents to which I have referred constitute the agency contract under which the firm of Hays & Bradstreet is operating, and under which it did operate during all the times material to this action; and that photostatic copies of these two documents may be received with the same force [199] and effect as if

(Testimony of Paul M. Arnold)

they were originals, and that no further foundation need be laid.

The Court: With that stipulation they may be received and marked plaintiff's next in order.

Mr. McGinley: Your Honor, the recital of the agreement is correct, that I make no objection to the fact that the document is not an original, but I do wish to object to the documents described on the ground that they are immaterial, in that limitations of knowledge and actions of the agent, not communicated to the insured, are not binding on the beneficiary, Harry Lutz.

The Court: About the only way that I could determine whether they would be would be to have them in evidence. You can hardly maintain that position unless they are in evidence, for me to determine the matter. They may be received and marked.

The Clerk: Plaintiff's Exhibit No. 29.

Mr. Herndon: The plaintiff rests, if your Honor please, subject to our reserved right to move to strike.

The Court: Yes, that is understood.

(Discussion.)

The Court: Suppose that each of you get your motions ready, and file them by 4:00 o'clock next Tuesday afternoon. That will give you much more time than you would have ordinarily. Then any objections that you have to the motions, will be filed by Thursday by 4:00 o'clock. Then I [200] will let you know when I am

(Testimony of Paul M. Arnold)

going to rule on them, and then will determine whether I am going to have oral or written arguments, or both. Have you gentlemen any choice?

Mr. McGinley: Whatever the wishes of the court are in this matter are satisfactory to me; either oral or written, or no argument. I had this in mind, that both counsel have filed pre-trial memorandums, and I think with possibly few additions our respective positions are covered quite adequately in those memoranda.

The Court: Let us see what develops after these motions are passed upon; then I will let you know. The case will be continued until the further order of the court.

Mr. McGinley: Might I ask this, your Honor, before adjournment, to guide me: Is there any particular form which your Honor would care to direct, as to the motions themselves? Would it be sufficient in regard to filing this document by Tuesday afternoon, if we referred to the page and number in the transcript? Do we have to repeat the grounds?

The Court: No, just refer to the grounds stated, by specifically referring to what you are moving to strike, on page so and so, line so and so to line so and so, the grounds for the motion being indicated at page so and so, line so and so, and then all I have to do is to follow the transcript.

[Endorsed]: Filed Aug. 21, 1945. [201]

[Title of District Court and Cause.]

Hon. Ralph E. Jenney, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, March 27, 1945,
2:00 P. M.

Mr. Herndon: If your Honor please, I wish at this time to read in evidence the deposition of Dr. Harold M. Frost. I don't know whether it would be better to have the objections ruled on as the questions are read, or not.

The Court: I imagine so. You have reserved the objections, haven't you? Where was this taken?

Mr. Herndon: It was taken in Boston on written interrogatories, direct interrogatories prepared by us, and cross interrogatories.

The Court: Suppose you read the question, the objection, and then the answer, in that form.

Mr. Herndon: Very well, your Honor. I wonder if it would be satisfactory if Mr. Anderson would read the deposition? My voice has about failed me.

The Court: Yes.

Mr. McGinley: May I say this, your Honor, in regard to the deposition: The deposition which is about to be read, was taken pursuant to written stipulation, which reserved to the defendants all of the objections which could be made to the testimony of Mr. Frost, if he were personally in court, and called as a witness to testify. Additionally, in order that counsel might overcome the objection as to the form of the question, the stipulation specifically provided the specific objections which were

objected to on [2] the ground of form; it was sort of an unorthodox procedure, but we were willing to do so, as I wanted to accommodate counsel so that there would be no interruption or delay in getting the deposition out.

The Court: Read the question and the objection, and I will rule on it.

DEPOSITION OF HAROLD M. FROST,
produced as a witness for the plaintiff.

(Read by Mr. Anderson.)

(1) Q. Please state your full name, place of residence and age.

A. Harold M. Frost; 25 Hundreds Circle, Wellesley Hills, Massachusetts; age, fifty-six.

(2) Q. Are you trained in any particular profession? A. Yes, in the medical profession.

(3) Q. State generally the nature and extent of your professional training and experience.

A. I graduated from Harvard Medical School in 1915 with the degree of Doctor of Medicine. I was surgical interne at the Massachusetts General Hospital, Boston, Mass., from 1913 to 1915. I was a First Lieutenant (honorary) in the Royal Army Medical Corps, stationed at No. 22 General Hospital, British Expeditionary Force, France, July to September, 1915. I was assistant surgeon and chief assistant surgeon at the American Women's War Hospital, [3] Paignton, England, October, 1915, to February, 1918. I was chief surgeon of said hospital from March to August, 1918. I was assistant surgeon, U. S. Troops, Winchester Area, England, September to November, 1918. I was commanding officer, U. S. Camp Hospital No. 35, Winchester England, from November, 1918, to February, 1919. I was

(Deposition of Harold M. Frost)

discharged from the U. S. Army March 1, 1919. I was assistant superintendent of the Massachusetts Eye and Ear Infirmary, Boston, Mass., from May, 1919, to October, 1921. I was engaged in the private practice of surgery in Boston, Massachusetts, from November, 1921, to 1928. I was assistant surgeon to outpatients in the Massachusetts General Hospital, Boston, Mass., 1921 to 1928. I am at present assistant in surgery to outpatients, Massachusetts General Hospital, Boston, Mass.

(4) Q. By whom and in what capacity are you employed?

A. I am employed by the New England Mutual Life Insurance Company in the capacity of Medical Director.

(5) Q. How long have you been employed in the capacity stated in your answer to the preceding interrogatory?

A. I have been so employed since February, 1931.

(6) Q. In what capacity were you employed by New England Mutual Life Insurance Company of Boston during the months of October, November and December of 1942?

A. In the capacity of Medical Director.

(7) Q. Please state fully what your duties were in [4] connection with your employment by New England Mutual Life Insurance Company of Boston during the months of October, November and December of 1942.

A. My duties fell into three main categories. First, I was directly and entirely responsible for such a medical selection of applicants for life insurance as would assure a satisfactory mortality among the policyholders of my company. I was directly responsible for the formulation

(Deposition of Harold M. Frost)

of the rules as to the acceptance of applicants with respect to medical history and condition of health, and for a strict adherence to such rules. It was my direct responsibility to make sure that all applications, from the medical point of view, were reviewed and acted upon by persons properly trained and fully acquainted with the rules of medical selection which I had formulated.

Secondly, I was wholly responsible for the organization and direction of the Medical Department at the Home Office of the New England Mutual Life Insurance Company, this department comprising three medical directors and some fifty clerks. The activities of this department comprised in general the handling of applications, their proper review and the proper action upon them, the correspondence with agents and medical examiners in the field, and the payment of fees for medical examinations.

Finally, I was directly and entirely responsible for the selection and maintenance of an adequate corps of some [5] five thousand medical examiners in the thirty-eight states in which my company operates.

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to the answer beginning with the word "I" and concluding with the word "operates" on the following grounds:—"I" to which I refer is the first occurrence, appearing in the statement "First, I was directly and entirely responsible".

The Court: In the very beginning?

Mr. McGinley: That's right, your Honor. The objection, your Honor, is on this ground: First, that the recitation in narrative form by the witness Frost of matters which he was "directly and entirely responsible for" is not responsive to the question, nor is it a statement of

(Deposition of Harold M. Frost)

fact, but is a conclusion of the witness. Each narration of matters which he purports to assign as a division of duties comes within the expression "I was directly and entirely responsible", and then he enumerates what he was directly and entirely responsible for.

The Court: The objection will be overruled. You have objected to that first sentence?

Mr. McGinley: Your Honor, I had objected to all of the answer of paragraph 7, beginning with the expression "First, I was directly and entirely responsible" clear through to the end of the answer terminating with the word "operates". [6]

The Court: In other words, to state it the other way, you object to everything except the first sentence?

Mr. McGinley: Yes, your Honor.

The Court: The objection will be overruled.

(8) Q. What have been your duties in connection with your employment by said company from December, 1942, to the present date?

A. My duties have been the same as outlined in my reply to previous Interrogatory No. 7.

(9) State fully the nature and extent of your training and experience in connection with the underwriting, acceptance and rejection of life insurance risks.

A. I was appointed Home Office Medical Examiner of the New England Mutual Life Insurance Company in November, 1921, and as a part of my duties then began to review and pass upon applications under the guidance and instruction of Dr. Edwin W. Dwight, then the Medical Director.

In 1924 I was appointed part time Assistant Medical Director of said company, my time then being given fully to the review and medical action on applications.

(Deposition of Harold M. Frost)

In 1928 I was appointed Associate Medical Director of said company on a full time basis.

In 1931 I was appointed Medical Director of said company, having remained in this capacity to the present.

In 1924 I became a member of the Association of Life Insurance Medical Directors of America, and have remained a [7] member to the present. For two years I was the editor of the Proceedings of said Association. For two years I was vice-president of said Association. For one year I was president of said Association. For the last four years I have been a member of the executive council of said Association. I have therefore become fully familiar with the publications of said Association, which deal exclusively with the underwriting, acceptance and rejection of life insurance risks.

I have become familiar with the publications of the Actuarial Society of America, which to a considerable extent deal with the underwriting, acceptance and rejection of life insurance risks.

By study I have become familiar with the published articles of numerous investigations carried out by these two organizations, dealing with the effect upon longevity of medical and physical impairments.

By study I have become familiar with the publications of the Medical Section of the American Life Convention, which deal exclusively with the underwriting, acceptance and rejection of life insurance risks.

Furthermore, I have had twenty years of extensive personal contact and correspondence with numerous medical directors of other life insurance companies dealing with the underwriting, acceptance and rejection of life insurance risks. [8]

(Deposition of Harold M. Frost)

Finally I have been intimately connected with the investigation of the mortality results of the New England Mutual Life Insurance Company for the last twenty years.

(10) Q. Are you familiar with the practices and usages of life insurance companies generally with respect to underwriting, acceptance and rejection of life insurance risks as such general practices and usages existed during the months of October, November and December of 1942? A. Yes.

(11) Q. State fully the sources of your knowledge concerning the usages and practices of life insurance companies generally with respect to the underwriting, acceptance and rejection of life insurance risks.

A. In answer I refer to my reply to Interrogatory No. 9.

(12) Q. Did New England Mutual Life Insurance Company of Boston, during the months of October, November and December of 1942, follow and adhere to the then prevailing usages and practices of life insurance companies generally with respects to the acceptance and rejection of applications for policies of life insurance?

Mr. McGinley: If your Honor please, the defendants and counterclaimant object to question No. 12 on the following grounds, first: There has been no foundation laid for the question, in that the witness has not been shown to be a [9] person qualified to express an opinion on the matter inquired into; and, 2. On the ground that the question calls for hearsay in that the interrogatory requires the witness to give an opinion as to what some other person knew, to-wit: the New England Mutual Life Insurance Company; and, 3. Foundational support is

(Deposition of Harold M. Frost)

not shown in the qualifications, in that it does not appear that this witness is the only one employed by the New England Mutual Life Insurance Company of Boston who would have the capacity to give an affirmative or negative answer to the interrogatory.

The Court: The objection will be overruled. I think the objection goes to the weight to be given to the answer, and not to its admissibility. A. Yes.

(13) Q. Was any standard and uniform procedure followed by New England Mutual Life Insurance Company of Boston during the months of October, November and December of 1942 in passing upon applications for policies of life insurance?

Mr. McGinley: The defendants urge the same objection stated to the last question, your Honor.

The Court: The same ruling. A. Yes.

(14) Q. If your answer to the preceding interrogatory was in the affirmative, describe the procedure followed.

A. Incoming applications for life insurance were received in the Control Department, and any miscellaneous [10] information which may have been received prior to the arrival of applications was attached to the appropriate applications in this department. The applications were then forwarded to the Medical Department for the attachment of any confidential information which might be in the files of the Medical Department. The applications were then forwarded to the Underwriting Department, where they were reviewed by lay underwriters. These lay underwriters are authorized to act upon applications for amounts of less than \$10,000, and

(Deposition of Harold M. Frost)

if in addition the amount of the application added to the amount of the insurance already in force in this company does not exceed \$25,000. These lay underwriters reviewed the application both from the medical angle, with respect to the medical history and condition of health, and from the nonmedical angle, with respect to such items as habits, morals, occupational hazard, and so forth. So far as concerns their review of medical history and condition of health, they were directly responsible to me in my capacity of Medical Director, to act in accordance with definite rules formulated by me in my capacity as Medical Director.

If the information in applications with respect to medical history and condition of health did not conform to the rules which I had formulated, such applications were then forwarded to the Medical Department. Likewise, if the amount of insurance applied for in such applications [11] exceeded the limits cited above, such applications were also forwarded to the Medical Department.

All applications referred to the Medical Department were reviewed and acted upon by one of the medical directors, who either approved the application, declined it, or, if he considered the issue of substandard insurance justifiable, referred said applications to the Underwriter of our reinsuring company to determine the appropriate ratings, a specialty in which this Underwriter has been trained.

Applications which were approved were referred back to the Underwriting Department for final review there with respect to the nonmedical items cited above. When applications thus submitted were finally approved in the

(Deposition of Harold M. Frost)

Underwriting Department, such applications were then forwarded to the Policy Department. In said department the policy was written. In addition Parts I and II of the application were there photostated and the photostats of the Parts I and II were there attached to the appropriate policies. The policies were then mailed out to the appropriate agencies.

(15) Q. Was the procedure which you have described in your answer to the preceding interrogatory in accordance with the then prevailing usages and practices of insurance companies generally in acting upon applications for policies of life insurance? [12]

Mr. McGinley: The defendants urge the same objection as stated to No. 12.

The Court: Same ruling, as to the weight to be given on the foundation laid. He has indicated what his experience was; apparently he was familiar with these matters.

A. Yes.

(16) Q. Attached to these interrogatories is a photostatic copy of the original application for policy number 1,172,844, consisting of two parts, each of which bears a signature reading "ABE LUTZ". Take up and examine this application and state whether you have previously seen the original thereof.

A. I have previously seen the original application, Policy No. 1,172,844.

(17) Q. Please hand the photostatic copy of the application just identified to the notary public and request that the same be marked "Plaintiff's Exhibit No. 1" for identification and that it be attached to your deposition.

A. I hand the Notary a photostatic copy of said application and request that the same be marked "Plaintiff's

(Deposition of Harold M. Frost)

Exhibit No. 1" for identification and that it be attached to my deposition.

(Photostatic copy of application of Abe Lutz is marked as Plaintiff's Exhibit 1 for identification.)

(18) Q. Will you please state when and where you first [13] saw the application, photostatic copy of which you have previously identified and which has been marked by the notary public as "Plaintiff's Exhibit No. 1" for identification?

A. I first saw said application on November 20, 1942, in my office at the Home Office of the New England Mutual Life Insurance Company at 501 Boylston Street, Boston, Massachusetts.

(19) Q. What action, if any, was taken by you with respect to this application for policy of insurance number 1,172,844?

A. I approved said application for policy of insurance No. 1,172,844 in my capacity of Medical Director. I was the sole official charged with full responsibility for passing upon said application in so far as the medical aspects were concerned. In the process of said approval I reviewed the information given in the application and in all other correspondence and papers attached to the file. Having satisfied myself that medical approval was justified, I then stamped the work sheet in connection with said application as follows: "Cleared, Medical Dept., Nov. 27, 1942, Medical Director, \$13,000 retention only standard," and signed "H. Frost."

I hand the Notary said work sheet and request that the same be marked "Plaintiff's Exhibit 1a" for identification and that it be attached to my deposition. [14]

(Deposition of Harold M. Frost)

I also had a letter from the Equitable Life Assurance Society of the United States dated November 25, 1942, signed by Robert M. Daley, M. D., the Medical Director of said company.

I hand said letter to the Notary and request that the same be marked "Plaintiff's Exhibit No. 4" for identification, and that it be attached to my deposition.

(Letter dated November 25, 1942, signed by Robert M. Daley, M. D., Medical Directors, is marked as Plaintiff's Exhibit 4 for identification.)

(26) Q. In approving said application for said policy, did you rely upon the information contained in the application, photostatic copy of which has been marked "Plaintiff's Exhibit No. 1" for identification? A. Yes.

(27) Q. Did New England Mutual Life Insurance Company of Boston rely upon the information contained in the application identified as "Plaintiff's Exhibit No. 1" in the issuing by it of policy number 1,172,844?

Mr. McGinley: That question is objected to upon the same ground as to No. 12. [17]

The Court: Objection sustained. It calls for the conclusion of the witness. 26 is "In approving said application did you rely upon the information contained"; the background comes from the other question. The difficulty with this type of question is it is conceivable there might be ten other men who had a finger in the pie which does not appear; therefore, I think the objection must be sustained to that particular question. A. Yes.

(28) Q. Your attention is directed to Part II of the document entitled "APPLICATION TO THE NEW ENGLAND MUTUAL LIFE INSURANCE COM-

(Deposition of Harold M. Frost)

PANY OF BOSTON", identified as "Plaintiff's Exhibit No. 1", and particularly to the questions numbered 35 A, 35 E, 35 H, 36 and 44, and to the answers to said questions written in ink. At the time you approved the application for policy number 1,172,844, did you have any information or knowledge concerning the matters referred to in said questions other than that given by the answers to said question?

A. Yes. I had the information contained in the letter cited by me in rely to Interrogatory 25, Plaintiff's Exhibit No. 4. This information was that Mr. Lutz had consulted Dr. Maurice Rosenfeld and Dr. Henry Lissner, and that Dr. Lissner had forwarded to the Equitable Life Assurance Society a certificate on September 3, 1942, stating that on August 11, 1942, a blood sugar test showed [18] 111 mgm per 100 cc. This was the only information I had concerning the matters referred to in said questions, other than that given in the answers to said questions.

(29) Q. In approving said application, did you rely upon the answers to any of the questions numbered 35 A, 35 E, 35 H, 36 and 44, as contained in said application?

A. Yes.

(30) Q. If your answer to the last preceding interrogatory was in the affirmative, state which of the answers to said questions as contained in said application were relied upon by you.

A. I relied upon the following answers to said questions:

35a, that Mr. Lutz had never suffered from indigestion;

35e, that Mr. Lutz had never suffered from dizziness or fainting spells;

(Deposition of Harold M. Frost)

35h, that Mr. Lutz had never suffered from pain or pressure in the chest;

36 and 44, that Mr. Lutz had consulted Dr. Rosenfeld on only one occasion during the previous five years, namely, in August, 1942, and for the sole purpose of having a physical examination and a blood sugar determination, the report of which was normal.

(31) Q. Assume the existence of the following facts: That on January 16, 1937, a person proposed for insurance in an application for the issuance of a policy of life insurance [19] had consulted a physician, complaining of dizziness with nausea; that on June 1, 1942, the proposed insured consulted the same physician, complaining of pain in the chest, and that on the last mentioned date, after examining the insured and taking an electrocardiogram, the physician prescribed nitroglycerine; that in July of 1942, the proposed insured was again examined by the same physician, and that, as a part of the last mentioned examination, an electrocardiogram was taken; and that the application for a policy of insurance upon the life of said proposed insured was acted upon during the month of November, 1942, by a life insurance company, which followed the practices and usages then prevailing among life insurance companies generally with respect to the underwriting acceptance and rejection of life insurance risks. Are you able to say, from your knowledge of the practices and usages among life insurance companies generally as prevailing during the year 1942, whether information of the facts recited in this interrogatory concerning the medical history of the proposed insured would have enhanced the premium to be charged or would have lead to a rejection of the risk?

(Deposition of Harold M. Frost)

Mr. McGinley: That question, your Honor, being interrogatory No. 31, is objected to upon the following grounds: First, that the question, being hypothetical, assumes facts not in evidence at this stage of the proceeding, and which have heretofore been objected to on various [20] grounds, including the question of privilege and hearsay, in so far as Harry Lutz, the counterclaimant, is concerned.

Secondly—

The Court: Let us take them one at a time. Just repeat again that objection.

Mr. McGinley: The defendant and counterclaimant object to interrogatory No. 31 upon the following grounds: 1. That interrogatory No. 31, being a hypothetical question, assumes, for the purpose of the question, facts which are not in evidence, and which have not been proven, in that the information recited as the basis for the hypothet, as heretofore being objected to, and being a disclosure of information privileged under Section 1881, sub 4, of the Code of Civil Procedure of the State of California, and on the additional ground—

The Court: One at a time. That ends your first objection. Let me see if I understand you. As I understand it, you concede that this man is being examined as an insurance expert, medical expert. Your point is that the hypothetical question contains elements not present in the record, and also is predicated upon other elements which on your theory, were inadmissible because of the fact that the facts deduced were privileged communications under Sec. 1881, sub 4, Code of Civil Procedure, am I correct?

Mr. McGinley: That's my first ground, your Honor.

(Deposition of Harold M. Frost)

The Court: I think that is not sound, particularly at [21] this time, as to the first part, because a hypothetical question, under our practice in the federal court, and even in the California State court, although I think the practice is not quite so liberal, does not need to contain all of the elements. It may be admitted for what it is worth. If a man happens to leave out an important element he has to sink or swim by his question. If an element is left out the answer does not mean very much. It may mean very little. Therefore, it is a question of the weight to be given to it. As to the other part, I will have to accept the answer subject to a motion to strike, predicated upon my final ruling upon the question of privilege so your record is made.

Mr. McGinley: The second ground is this: That the facts which serve as the basis of the hypothet constitutes hearsay in so far as Harry Lutz is concerned, and, therefore, being inadmissible as evidence against Harry Lutz, are not competent as part of the hypothetical question.

(Discussion.)

Mr. McGinley: Now, the purpose of preserving my record on the second ground is this, your Honor: If your Honor holds that entirely aside from the question of privilege my objection that the statements of Dr. Rosenfeld as to the history of Abe Lutz is hearsay, and not binding, then there would be no basis for the facts that are recited in the hypothetical question. [22]

The Court: Let me see if I understand you; your objection to the question is that it contains as a part thereof certain elements, the proof of which is inadmissible, as founded on inadmissible hearsay, and therefore the question should fall?

(Deposition of Harold M. Frost)

Mr. McGinley: That is stated accurately, your Honor.

The Court: I think we will have to accept that temporarily, subject to a motion to strike, predicated upon my ruling upon your objections to hearsay.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., Wednesday, March 28, 1945.) [23]

Los Angeles, California, Wednesday, March 28, 1945,
10 A. M.

The Court: I think in connection with this question and objection, that in order to make a sound objection you should specify what particular element in the question you claim is hearsay.

Mr. McGinley: If your Honor please, the defendant objects to the following statement appearing in the questions on the ground that they are hearsay.

The Court: In what questions?

Mr. McGinley: Question 31.

The Court: In the singular.

Mr. McGinley: 1. "That on January 16, 1937, a person proposed for insurance in an application for the issuance of a policy of life insurance had consulted a physician, complaining of dizziness and nausea; that on June 1, 1942, the proposed insured consulted the same physician, complaining of pain in the chest, and that on the last-mentioned date, after examining the insured and taking an electro-cardiogram, the physician prescribed nitroglycerine; that in July of 1942, the proposed insured was again examined by the same physician, and that, as a part of the last-mentioned examination, an electrocardiogram was taken."

(Deposition of Harold M. Frost)

Those statements, your Honor, are objected to by the defendant on the ground that they are hearsay.

The Court: It seems to me that you are going to [24] require a transcript here in order for you properly to make your motions to strike, because under our rules a motion to strike must be specific. You said you had still another objection. I believe?

Mr. McGinley: Yes, your Honor, I also object upon the ground that the proper foundation has not been laid to qualify the witness, Mr. Frost, to give an opinion on whether or not the conditions and statements assumed in the hypothetical question would have enhanced the premium. Additionally, there is no foundation by reason of any facts disclosed to the insurance company anything other than a nominal premium was charged.

The Court: I will take the matter, subject to a motion to strike. The answer may be read.

A. Yes, it would have led to an outright immediate rejection of the risk.

(32) Q. Assuming a disclosure of the facts concerning the medical history of the proposed insured as recited in the preceding interrogatory, what action would have been taken by an insurer following the usages and practices of insurance companies generally as such usages and practices prevailed during the year 1942?

Mr. McGinley: May it be understood that the same objection last urged, on the same grounds, may be considered as having been urged to this question?

The Court: The same ruling. [25]

A. The insurer would have rejected the application immediately and without further investigation.

(Deposition of Harold M. Frost)

(33) Q. Are you able to say, from your knowledge of the practices and usages among life insurance companies generally, as prevailing during the months of November and December of 1942, whether information to the effect that a proposed insured had suffered pain in the chest and, within six months prior to the date of the application for life insurance, had submitted to a physical examination, including the taking of an electrocardiogram, and that after such an examination, the examining physician had prescribed nitroglycerine, would have led to a rejection of the proposed risk, or whether it would have led the proposed insurer to have sought additional information?

Mr. McGinley: If your Honor please, may it be stipulated that the same objection urged in regard to interrogatory No. 1, with the specification of the testimony as hearsay, may be considered as having been made to interrogatory 33?

The Court: It may be so stipulated.

Mr. Herndon: So stipulated.

The Court: The same ruling.

A. Most companies would have rejected the proposed risk immediately and without further investigation. A few companies might have requested statements from the attending physicians in order to obtain firsthand information. [26]

(34) Q. If, in your answer to the preceding interrogatory, you have stated that such information would have led the insurer to seek additional information, and if, as a result of further inquiries, it had been disclosed that approximately six years prior to the date of the application, the proposed insured had consulted a heart

(Deposition of Harold M. Frost)

specialist, complaining that he had suffered from dizziness and nausea, and that upon examination made on the last mentioned date, the examining physician had made a tentative diagnosis of cerebral arteriosclerosis, and that on June 1, 1942, the proposed insured had consulted the same physician, complaining of chest pain, and that on the last mentioned date an examination of the proposed insured was made by the physician, including the taking of an electrocardiogram, and that said physician, upon the basis of said examination, had made a tentative diagnosis of mild angina pectoris and had prescribed the taking of nitroglycerine by the proposed insured, are you able to say, from your knowledge of the practices and usages among life insurance companies generally, as prevailing during November and December of 1942, whether information of the facts just recited would have led to a rejection of the risk?

Mrs. McGinley: May it be stipulated, your Honor, that the same objection as was made to interrogatory No. 31 may be stipulated as having been urged to the last interrogatory? [27]

The Court: May it be so stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling. A. Yes.

(35) Q. If your answer to the last preceding interrogatory was in the affirmative, state whether the information recited in said last interrogatory would have lead to a rejection of the proposed risk.

Mr. McGinley: May it be stipulated, your Honor, that the same objection as to interrogatory No. 31 may have been considered as to this?

(Deposition of Harold M. Frost)

The Court: May it be so stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling.

A. Yes, to an outright rejection of the proposed risk.

(36) Q. From your knowledge of the practices and usages among life insurance companies generally, as such practices and usages existed during the year 1942, please state whether a medical history of a proposed insured, indicating that within a period of one year prior to the date of an application for life insurance the proposed insured had complained of pain in the chest and had submitted to physical examinations, including the taking of electrocardiograms, and that the proposed insured had taken nitroglycerine pursuant to prescription given by a physician after examination which [28] included the taking of an electrocardiogram, would be deemed material to a decision by the proposed insurer as to whether the risk should be accepted or rejected.

Mr. McGinley: May it be stipulated, your Honor, that the same objection which was urged to interrogatory No. 31 may stand against interrogatory No. 36?

The Court: May it be stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling.

Mr. McGinley: And the additional objection, your Honor, that the question calls for a conclusion in that it calls for the opinion of someone other than the witness, towit, the proposed insurer.

The Court: I think that objection is sound. He is not being asked what his recommendation as a medical officer would be, to the company. He is being asked

(Deposition of Harold M. Frost)

what the company would do, and the company might not follow his advice.

Mr. Herndon: Yes, I think it is reasonably debatable, your Honor. I would submit, however, that the question calls for an answer based on general usage and practice. Fairly interpreted undoubtedly the question has that meaning, but we will submit to your Honor's ruling, particularly in view of the fact that we don't deem the question and answer indispensable.

The Court: It seems to me that the material [29] elements are covered elsewhere. I am not sure that you interpret this question to mean substantially this: What, from your experience as a medical officer, is indicated by your answers to the questions, would be the custom and practice of an insurer under those circumstances? I am inclined to think that the question is unfortunately worded. I will sustain the objection. I might possibly change my mind before the close of the case, but I think that objection is sound. It is to the additional objection that I am sustaining it.

(37) Q. If, at the time said application for policy number 1,172,844 was approved by you, you had known that the said Abe Lutz had consulted a physician on June 1, 1942, complaining of pain in the chest, and that the physician, after the examination of the said Abe Lutz, including the taking of an electrocardiogram, had prescribed nitroglycerine, and that the said Abe Lutz had again consulted the same physician in July of 1942, and that on the last mentioned date an electrocardiogram had been taken, what action would have been taken by you in your capacity as an employee of New England Mutual

(Deposition of Harold M. Frost)

Life Insurance Company of Boston with reference to said application?

Mr. McGinley: May it be stipulated, your Honor, that the same objection as was urged to interrogatory No. 31 may stand as to interrogatory 37? [30]

The Court: So stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling.

A. In my capacity as an employee and Medical Director of the New England Mutual Life Insurance Company I would have rejected the application without further investigation.

(38) Q. If, at the time said application for policy number 1,172,844 was approved by you, you had known that said Abe Lutz had suffered pain in the chest for a period of approximately one year, and that within a period of six months prior to the date of said application, said Abe Lutz had consulted a physician and had submitted to two examinations involving the taking of electrocardiograms, what action would have been taken by you in your capacity as an employee of New England Mutual Life Insurance Company of Boston with reference to said application?

Mr. McGinley: May it be stipulated, your Honor, that the same objection stated as to interrogatory No. 31 may stand as against interrogatory No. 38?

Mr. Herndon: Your Honor, I have a little apprehension about that question—the elements that it should obtain for one year. In fairness to the court, I have a question mark on that. I am not sure.

The Court: There was a question in my mind when you read that. I don't believe the evidence is clear. The [31] question is not one hundred per cent clear.

(Deposition of Harold M. Frost)

Mr. Herndon: May the plaintiff withdraw that question, your Honor?

The Court: Yes.

(39) Q. In approving the application for policy of insurance number 1,172,844, did you, in your capacity as an employee of New England Mutual Life Insurance Company of Boston, consider the answers to questions 35 E, 35 H 36 and 44 of the application material to the risk insured against?

A. Yes, most certainly.

(40) Q. On what date did you approve the application for policy of insurance number 1,172,844?

A. I approved said application for policy of insurance No. 1,172,844 on November 27, 1942.

(41) Q. On what date was policy of insurance number 1,172,844 issued by New England Mutual Life Insurance Company of Boston?

A. Said policy of insurance No. 1,172,844 was issued by the New England Mutual Life Insurance Company on December 1, 1942.

(42) Q. At what place was said policy number 1,172,844 approved and issued?

A. Said policy No. 1,172,844 was approved and issued at the Home Office of the New England Mutual Life Insurance Company at 501 Boylston Street, Boston, Mass. [32]

The Court: I just have a thought; why wouldn't it save this reporter a lot of trouble, and would not hurt us any in going over these interrogatories, to just put in these interrogatories which were objected to, and then simply say: Interrogatory so and so read, objection so and so, and ruling of the court. Where there is no

(Deposition of Harold M. Frost)

objection there is no need of having anything in there.

Mr. Herndon: That would be satisfactory to the plaintiff.

Mr. McGinley: So stipulated.

The Court: The stipulation will be received.

(43) Q. What was done with said policy after it was issued?

A. Said policy No. 1,172,844 was mailed on December 2, 1942, from the Home Office of the New England Mutual Life Insurance Company, to our general agents, Messrs. Hays & Bradstreet at 609 South Grand Avenue, Los Angeles, California.

(44) Q. If you have stated in your answer to the preceding interrogatory that said policy was sent by mail from the home office of New England Mutual Life Insurance Company of Boston to Los Angeles, California, please state to whom said policy was sent and the date of its mailing.

A. In answer I refer to my reply to previous Interrogatory No. 43.

(45) Q. Please state the provisions of the established [33] rule or rules, if any, of New England Mutual Life Insurance Company of Boston, effective during November and December of 1942, governing the acceptance or rejection of a life insurance risk in a case wherein the medical history of the proposed insured would show such matters as the following: That the proposed insured had suffered from pain in the chest within a year prior to the date of the application for the insurance, and that within the same period the proposed insured had submitted to three physical examinations which included the taking of electrocardiograms; that as a result of such

(Deposition of Harold M. Frost)

examinations, the examining physician had made a tentative diagnosis of mild angina pectoris and had prescribed the taking of nitroglycerine.

Mr. McGinley: May it be stipulated, your Honor, that the objections urged with regard to interrogatory No. 31 may be considered as having been stated in opposition to interrogatory No. 45?

The Court: May it be so stipulated?

Mr. Herndon: So stipulated.

The Court: This is the first time that a hypothetical question has referred to the established rules of the New England Mutual Life. I don't think that question would be sound; I think it would be objectionable, unless it is saved by the prior question and answer that the usages and customs in the New England Life were the usages and customs of other insurance companies. With that connecting [34] link and that understanding, it will be the same ruling.

A. The provisions of the established rules of the New England Mutual Life Insurance Company were that the life insurance risk would be rejected outright and immediately without further investigation.

Mr. McGinley: If your Honor please, in regard to the answer, the defendants move to strike it upon the ground, first, that it is not responsive, and, secondly, it is the interpretation of the witness as to what the provisions of the rules of the New England Mutual Life disclose rather than any statement of the provisions of the established rules of the New England Mutual Life Insurance Company.

The Court: The same ruling.

(Deposition of Harold M. Frost)

(46) Q. Based upon your knowledge of the usages and practices among life insurance companies generally, as prevailing in November and December of 1942, state whether disclosure of a medical history of a proposed insured would have led to a rejection of the proposed risk if such medical history had disclosed the following matters: That the proposed insured had consulted a physician approximately six years prior to the date of the application for insurance, complaining of dizziness with nausea, and that after examination, the physician made a tentative diagnosis of slight cerebral arteriosclerosis, and that within a period of one year prior to the date of the application, the proposed insured had consulted a physician, complaining of pains in the chest, and that after examination and the taking [35] of an electrocardiogram, the physician had made a tentative diagnosis of mild angina pectoris.

Mr. McGinley: If your Honor please, may it be stipulated that the same objection urged to interrogatory No. 31 may stand to interrogatory 46?

The Court: It may be so stipulated?

Mr. Herndon: So stipulated.

The Court: Same ruling.

A. The history set forth in this interrogatory of a proposed insured would have led to an immediate outright rejection without further investigation.

(47) Q. Subsequent to the issuance of policy number 1,172,844, did New England Mutual Life Insurance Company of Boston receive any information concerning the health or medical history of Abe Lutz, the insured under said policy number 1,172,844, which was not in-

(Deposition of Harold M. Frost)

cluded or contained in either the application identified as "Plaintiff's Exhibit No. 1" or in the report of the medical examiner identified as "Plaintiff's Exhibit No. 2"?

A. Yes.

(48) Q. If your answer to interrogatory number 47 was in the affirmative, please state when the New England Mutual Life Insurance Company of Boston received any information concerning the health or medical history of said Abe Lutz which was not contained in either the application or in the report of medical examiner which have been identified as "Plaintiff's Exhibits Nos. 1 and 2".

A. On December 14, 1942, and on December 29, 1942. [36]

(49) Q. What was the information received by New England Mutual Life Insurance Company of Boston to which you have referred in your answer to interrogatory number 48?

A. On December 14, 1942, said company received a photostat of an Attending Physician's Statement, said to have been submitted by Dr. M. H. Rosenfeld to the Medical Director of the Equitable Life Assurance Society of the United States, which contained no signatures on it, revealed nothing except the indication that at the request of Abe Lutz the following information was submitted, namely, "Blood sugar determination 115 mill."

I refer to Defendants' and Counterclaimants' Exhibit No. 2, marked "Defts. & Counterclaimant's Ex. 2 for Iden., 3-2-45, W. H. Davis, Notary Public," a copy of which I hand to the Notary and ask that it be attached to this deposition.

(Deposition of Harold M. Frost)

(Photostatic copy of Attending Physician's Statement, marked "Defts. & Counterclaimant's Ex. 2 for Iden., 3-2-45, W. H. Davis, Notary Public," is attached hereto.)

On December 29, 1942, said company received information that when an application on the life of Abe Lutz was submitted to the Equitable Life Assurance Society of the United States, this company asked him for a blood sugar test; that before doing so Mr. Lutz went to Dr. Rosenfeld to have this test made and to see if he was all right; that there were no symptoms, that the findings were negative, that no treatment or advice was given, and that the results were [37] satisfactory.

(50) Q. From what source and in what manner did you receive the information which you have stated in your answer to interrogatory number 49?

A. The photostat of the Attending Physician's Statement referred to by me in reply to previous Interrogatory No. 49 as having been received by said company on December 14, 1942, came from Mr. Harold P. Morgan of the Hays & Bradstreet agency in Los Angeles. It was submitted with an explanatory letter from Mr. Morgan dated December 8, 1942, addressed to Mr. Doane Arnold, Manager, Underwriting Department, New England Mutual Life Insurance Company, 501 Boylston Street, Boston, Mass.

I hand to the Notary said letter and request that it be marked "Plaintiff's Exhibit No. 5" for identification and that it be attached to my deposition.

(Letter dated December 8, 1942, from Harold P. Morgan to Doane Arnold, is marked as Plaintiff's Exhibit 5 for identification.)

(Deposition of Harold M. Frost)

The information cited in my reply to previous Interrogatory No. 49 as having been received by said company on December 29, 1942, came from Mr. Harold P. Morgan in a letter written by him and addressed to me, dated December 24, 1942.

I hand said letter to the Notary and request that it be marked "Plaintiff's Exhibit No. 6" for identification, [38] and that it be attached to my deposition.

(Letter dated December 24, 1942, from Harold P. Morgan to Dr. Harold M. Frost, is marked as Plaintiff's Exhibit 6 for identification.)

(51) Q. When policy number 1,172,844 was issued, was a copy of the application, copy of which has been identified as "Plaintiff's Exhibit No. 1", attached thereto?

A. Yes.

Mr. Herndon: Your Honor, it might be well if Mr. McGinley read the cross interrogatories and answers, since they are prepared by him.

The Court: Where are the exhibits to the deposition? They don't seem to be here.

Mr. Herndon: We assumed, your Honor, that they were in the same folder with the original deposition.

The Court: It says here, memorandum with exhibits attached to the deposition of Dr. Frost. May it be deemed that they are attached to the deposition?

Mr. Herndon: So stipulated.

Mr. McGinley: So stipulated.

The Court: The clerk will see that they are attached under the same cover, so that they will be all together there. [39]

(Deposition of Harold M. Frost)

Cross-Interrogatories

(Read Mr. McGinley.)

(1) Q. Attached to these cross-interrogatories is a photostatic copy of a letter dated November 16, 1942, from Harold P. Morgan to Mr. Doane Arnold. Please examine this letter and state whether you have previously seen the original or a copy thereof. A. Yes.

(2) Q. Please hand the photostatic copy of the letter just identified to the Notary Public and request that the same be marked Defendants' Exhibit No. 1 for identification, and that it be attached to your deposition.

A. I hand the photostatic copy of the letter just identified to the Notary Public and request that the same be marked "Defendants' Exhibit No. 1" for identification and that it be attached to my deposition.

(Photostatic copy of letter dated November 16, 1942, from Harold P. Morgan to Doane Arnold is marked as Defendants' Exhibit 1 for identification.)

(3) Q. Directing your attention to the photostatic copy of the letter just identified Defendants' Exhibit 1 for identification, and particularly that language reading as follows:

"Part of this business is going to be given to the New England Mutual, and as I understand it, there is some history, and as a consequence, the Local Office of the Equitable wired their Home Office to turn all papers over to the New [40] England Mutual, and in a wire just received the Equitable stated they would be glad to do so, but would prefer that our Home Office make this request of the Home Office of the Equitable. Would you therefore be kind enough to get in touch with them

(Deposition of Harold M. Frost)

for the necessary papers, and in the meantime we shall hope to forward an examination on our blank completed by their Chief Examiner here, Dr. Waste." will you please state whether the Medical Department of New England Mutual Life Insurance Company of Boston received any papers from the Equitable Life Assurance Company concerning the history of Abe Lutz for insurance?

A. On receipt of said letter Mr. Arnold, Manager of the Underwriting Department, wired the Equitable Life Assurance Society for copies of the papers of that company. In response to this wire the Medical Director of the Equitable wrote to me stating that he could not forward photostats of the papers as it was contrary to his company's policy. The Medical Department of New England Mutual Life Insurance Company received a letter from the Equitable addressed to me, but no other papers.

(4) Q. If your answer to cross-interrogatory No. 3 is in the affirmative, please hand the communication or communications from the Equitable Life Assurance Company to the Notary Public and request that the same be marked as a group and designated Defendants' Exhibit No. 2 for identification and also request that they be attached to your deposition. [41]

A. I hand to the Notary a copy of the telegram cited in my reply to previous cross-interrogatory No. 3 and request that it be marked "Defendants' Exhibit No. 3" for identification and that it be attached to my deposition.

(Deposition of Harold M. Frost)

(Copy of telegram dated November 19, 1942, from New England Mutual Life Insurance Company to Equitable Life Assurance Society is marked as Defendants' Exhibit 3 for identification.)

With reference to the letter written by the Medical Director of the Equitable to me, as cited in my reply to previous Cross-Interrogatory No. 3, I refer to Plaintiff's Exhibit No. 4.

(5) Q. Please state whether you had any correspondence with the Equitable Life Assurance Company during the months of November and December, 1942, relative to Abe Lutz, or the application of Abe Lutz for insurance either in the Equitable Life Assurance Company, or in the New England Mutual Life Insurance Company of Boston.

A. Yes.

(6) Q. If your answer to cross-interrogatory No. 5 is in the affirmative, please hand the copy or copies of such communications to the Notary Public and request that the same be marked as a group as Defendants' Exhibit No. 3 for identification.

A. In answer to this Cross-Interrogatory I refer to Plaintiff's Exhibit No. 4, and state that this is the only [42] communication received from the Equitable Life Assurance Society.

(7) Q. Please state whether you received any written communications from Harold P. Morgan, of Hays & Bradstreet, Los Angeles, California, during the months of November and December, 1942.

A. Yes. Four letters were received from Mr. Morgan dated respectively November 16, 1942, November

(Deposition of Harold M. Frost)

17, 1942, December 8, 1942, and December 24, 1942. The first three were addressed to Mr. Arnold, Manager of the Underwriting Department; the last was addressed to me.

(8) Q. If your answer to cross-interrogatory No. 7 is in the affirmative please hand the copy or copies of such correspondence to the Notary Public and request that the same be marked Defendants' Exhibit No. 4 for identification, and that they be attached to your deposition.

A. I hand to the Notary a letter from Harold P. Morgan to Doane Arnold, dated November 16, 1942, and also a letter from Harold P. Morgan to Doane Arnold, dated November 17, 1942, and request that these letters be marked "Defendants' Exhibit No. 4" for identification and that they be attached to my deposition.

(Letters dated November 16, 1942, and November 17, 1942, from Harold P. Morgan to Doane Arnold, are marked as Defendants' Exhibit 4 for identification.)

With respect to the letter received from Mr. Morgan [43] dated December 8, 1942, as cited in my previous reply to Cross-Interrogatory No. 7, I refer to Plaintiff's Exhibit No. 5.

With respect to the letter received from Mr. Morgan dated December 24, 1942, as cited in my reply to previous Cross-Interrogatory No. 7, I refer to Plaintiff's Exhibit No. 6.

(9) Q. Please state whether you sent any letters or wires to Harold P. Morgan, of Hays & Bradstreet, or New England Mutual Life Insurance Company of Boston, at Los Angeles, California, relative to Abe Lutz

(Deposition of Harold M. Frost)

or the application of Abe Lutz for insurance with the New England Mutual Life Insurance Company.

A. No letters or wires were sent to Harold P. Morgan. Three wires and three letters were sent over the period from December 1, 1942, to April 8, 1943. Four of these were sent by the Underwriting Department and two by the Medical Department. Three of them were addressed to Hays & Bradstreet, three of them to the New England Mutual Life Insurance Company at Los Angeles.

(10) Q. If your answer to cross-interrogatory No. 9 is in the affirmative, please hand the letters or wires to the Notary Public and request that the same be numbered as a group as Defendants' Exhibit No. 5 for identification, and that they be attached to your deposition.

A. I hand to the Notary copy of telegram dated [44] December 1, 1942, from the Underwriting Department to the New England Mutual Life Insurance Company, Los Angeles; also photostatic copy of a document attached to the Cross-Interrogatories bearing date December 1, 1942, being a letter from Doane Arnold to Messrs. Hays & Bradstreet; also copy of a telegram from the New England Mutual Life Insurance Company at Boston to the New England Mutual Life Insurance Company at Los Angeles, dated April 8, 1943, entered on the back of a letter from Harold P. Morgan to Dr. Frederick R. Brown, dated April 5, 1943, and I request that these three communications be marked "Defendants' Exhibit No. 5" for identification and that they be attached to my deposition.

(Deposition of Harold M. Frost)

(Copy of telegram dated December 1, 1942, from Underwriting Department to New England Mutual Life Insurance Company, Los Angeles, photostatic copy of a document bearing date December 1, 1942, being letter from Doane Arnold to Messrs. Hays & Bradstreet, and copy of a telegram from New England Mutual Life Insurance Company, Boston, to New England Mutual Life Insurance Company at Los Angeles, dated April 8, 1943, are marked as Defendants' Exhibit 5 for identification.)

I also hand to the Notary a photostatic copy of letter from Dr. H. M. Frost, Medical Director, to Hays & Bradstreet, dated December 14, 1942, and request that it be marked "Defendants' Exhibit No. 11" for identification and [45] that it be attached to my deposition.

(Photostatic copy of letter dated Decemebr 14, 1942, from H. M. Frost to Hays & Bradstreet, is marked as Defendants' Exhibit 11 for identification.)

I also hand to the Notary a photostatic copy of letter from Dr. F. R. Brown, Associate Medical Director, to Messrs. Hays & Bradstreet, dated January 14, 1943, and request that it be marked "Defendants' Exhibit 12" for identification and that it be attached to my deposition.

(Photostatic copy of letter dated January 14, 1943, from F. R. Brown to Hays & Bradstreet, is marked as Defendants' Exhibit 12 for identification.)

I hand to the Notary photostatic copy of telegram from New England Mtual Life Insurance Company to New England Mutual Life Insurance Company at Los Anegels, dated December 29, and request that it be marked "Defendants' Exhibit No. 13" for identification and that it be attached to my deposition.

(Deposition of Harold M. Frost)

(Photostatic copy of telegram dated December 29, from New England Mutual Life Insurance Company, Boston, to New England Mutual Life Insurance Company, Los Angeles, is marked as Defendants' Exhibit 13 for identification.)

(11) Q. Please state whether New England Mutual Life Insurance Company of Boston is a member of the Medical Information Bureau located in Cambridge, Massachusetts? A. Yes. [46]

(12) Q. Please state whether you are a member of the Medical Information Bureau located in Cambridge, Massachusetts?

A. No. Life insurance companies only can be members of said Bureau, not individuals.

(13) Q. Please state whether New England Mutual Life Insurance Company obtained from the Medical Information Bureau during the month of November or December, 1942, any information concerning Abe Lutz?

A. Yes.

(14) Q. If your answer to cross-interrogatory 13 is in the affirmative, and the information received was oral, please give the substance of such information. If your answer is in the affirmative, and the information was conveyed by means of a written communication, please state when you first received such communication and then hand the communication just identified to the Notary Public with the request that it be marked Defendants' Exhibit No. 6 for identification, and that such communication be attached to your deposition.

A. The information was conveyed upon a printed card, in code, and was filed in the Medical Department at the

(Deposition of Harold M. Frost)

Home Office. This card is not available for the following reason: It is customary with the New England Mutual Life Insurance Company, as with most other life insurance companies, to remove from their files and to destroy by burning the cards of policyholders who have died; these [47] cards being removed and burned four times yearly, once every three months. The card of Mr. Lutz was burned following this routine custom. However, I know what the information was which was entered on this card. The information was that some company had made a blood sugar test, the result of which was satisfactory; and that on two or more examinations of the urine no sugar had been found in the urine. I know furthermore that no other information was received from this source during the months of November and December, 1942.

Mr. McGinley: Your Honor, the defendants move to strike that portion of the answer of the witness beginning with the word, "However, I know what the information was which was entered on this card," and continuing to the end of the answer, on the ground that it is not responsive; and, secondly, on the ground that no proper foundation is laid which would permit the witness to give his opinion as to what was contained on the card.

The Court: Don't you get what you asked for in 13:
"Please state whether New England Mutual Life Insurance Company obtained from the Medical Information Bureau during the months of November or December, 1942, any information concerning Abe Lutz."

"14. If your answer to cross interrogatory 13 is in the affirmative, and the information received was oral, please give the substance of such information."

(Deposition of Harold M. Frost)

He says: "The information was conveyed upon a printed [48] card, in code, and was filed in the Medical Department at the Home Office. This card is not available." Maybe it is not responsive. It might be brought in by the other side on the ground of the loss of the card, but he volunteered something that was not in the question. It really was not oral, but information actually contained on the card he is revealing.

Mr. Herndon: I submit, your Honor, that the answer is responsive; that it is also proper explanatory matter of the answer. I doubt, under the circumstances, that the objection here made is timely.

The Court: Were not all objections reserved to this time?

Mr. Herndon: Yes, I think all objections to form were reserved. I submit, your Honor, the fact that an answer is not strictly responsive is not, under all the circumstances, a sufficient reason for the striking or refusal to receive it. It would only be by a very strict construction of the question that this answer is not entirely responsive.

The Court: "Please state whether New England Mutual Life Insurance Company obtained from the Medical Information Bureau during the month of November or December, 1942, any information concerning Abe Lutz."

Now, the answer to that was yes. Then in cross interrogatory 14: "If your answer to cross interrogatory [49] 13 is in the affirmative, and the information received was oral, please give the substance of such information." That does not apply, because his answer shows that the information was not oral. —"If your answer is in the

(Deposition of Harold M. Frost)

affirmative, and the information was conveyed by means of a written communication, please state when you first received such communication and then hand the communication just identified to the Notary Public with the request that it be marked Defendants' Exhibit No. 6 for identification, and that such communication be attached to your deposition." —Now, of course, you could have asked where the card was, and show that it had been destroyed; then the contents of it could be proved by you. The motion to strike will be granted.

(15) Q. Before approving the issuance of policy No. 1,172,844 which you have previously testified to, please state whether any investigation was made by you or your department of Abe Lutz' previous insurance record. If your answer is in the affirmative please state fully what was done by you or your department in making such investigation? A. No.

(16) Q. Please state whether you knew at the time you approved the issuance of policy No. 1,172,844 that Abe Lutz had been previously examined by Dr. John M. Waste shortly prior to November 16, 1942 for a policy of \$10,000 in the Equitable Life Assurance Company?

A. Yes. [50]

(17) Q. Please examine photostatic copy of a document attached to these cross-interrogatories bearing date December 1, 1942, being a letter from Doane Arnold to Messrs. Hays & Bradstreet, and state whether you have previously seen the original or a copy of said document?

A. Yes, the photostatic copy referred to is incorporated in Defendants' Exhibit No. 5.

The Court: It was my understanding that your motion to strike only went as far as the words "found in the

(Deposition of Harold M. Frost)

urine," in the unmarked line, the third from the bottom, is that correct?

Mr. McGinley: My motion to strike the portion of the answer given under 14, your Honor, commences with the word "However", in the middle of the answer, and concludes with the date, "December, 1942."

The Court: Then it should be denied as to the last sentence, and granted as to that portion running down to the words "found in the urine." The last sentence is responsive.

Mr. McGinley: Yes.

(18) Q. If your answer is in the affirmative to cross-interrogatory No. 17, please name the person by whom it was exhibited to you?

A. Said letter was not exhibited to me by any person. It was seen by me on several various occasions when I was obliged to review the file of papers. [51]

(19) Q. Prior to the issuance of policy No. 1,172,844 by New England Mutual Life Insurance Company had you been informed that Abe Lutz had been attended by Dr. Rosenfeld and Dr. Lissner? A. Yes.

(20) Q. If your answer to cross-interrogatory No. 19 is in the affirmative, please answer the following:

- (a) When did you acquire such information?
- (b) By whom was such information furnished?
- (c) If such information was conveyed by conversation, give the name of parties present, and the substance of said conversation.
- (d) If such information was conveyed by written communication or communications, please hand the same to the Notary Public and request that they be marked Defendants' Exhibit No. 7 for identification, and that they be attached to your deposition.

(Deposition of Harold M. Frost)

A. With respect to said information and as concerns attendance upon Mr. Lutz by Dr. Rosenfeld, this latter information first came to my attention the first time I reviewed the application, which was November 20, 1942; and because of the fact that Mr. Lutz, in his answers in Part II of his application had indicated that an examination of him had been made by Dr. Rosenfeld on one occasion only, in August, 1942. As concerns attendance upon Mr. Lutz by Dr. Lissner, I first became aware of this information on [52] November 27, 1942, on receipt of a letter from the Medical Director of the Equitable Life Assurance Society in which the fact was mentioned. This letter is Plaintiff's Exhibit No. 4.

(21) Q. If your answer to cross-interrogatory No. 19 is in the negative, please state when you were informed that Dr. Rosenfeld and Dr. Lissner had attended Abe Lutz?

A. In answer I refer to my replies to Cross-Interrogatories Nos. 19 and 20.

(22) Q. Please examine the photostatic copy of a document attached to these cross-interrogatories bearing the heading "ATTENDING PHYSICIAN'S STATEMENT" and state if you have previously seen the original of such statement? A. Yes.

(23) Q. Please hand the photostatic copy of the document entitled "ATTENDING PHYSICIAN'S STATEMENT" just mentioned and request that it be marked Defendants' Exhibit No. 8 for identification, and that it be attached to your deposition.

A. I hand to the notary a photostatic copy of a document entitled "Attending Physician's Statement," just mentioned, and request that it be marked "Defendants'

(Deposition of Harold M. Frost)

Exhibit No. 8" for identification and that it be attached to my deposition.

(Photostat of document, Attending Physician's Statement, is marked as Defendants' Exhibit 8 for identification.)

(24) Q. Is it not a fact that during the months of [53] November and December, 1942, the document entitled "ATTENDING PHYSICIAN'S STATEMENT" just identified was used by New England Mutual Life Insurance Company in obtaining information from physicians or surgeons of applicants for insurance in those cases where the New England Mutual Life Insurance Company had been given the name of such attending physicians or surgeons?

A. No. It was used only in those cases in which, in the judgment of a medical director or a medical examiner or of an agent it would be advisable to get first hand information from the attending physician or surgeon. It was not used routinely in all cases in which the name of an attending physician or surgeon had been given in the applicant's answers to the questions in Part II of the application. It was used if the replies of the applicant in his answers to the questions in Part II of the application threw definite doubt upon the applicant's medical history. It was routinely used for the larger amounts of insurance, in excess of \$15,000.

(25) Q. From your knowledge of the usages and practices among life insurance companies generally, as prevailing during the months of November and December, 1942, is it not a fact that the New England Mutual Life Insurance Company mailed to attending physicians and

(Deposition of Harold M. Frost)

surgeons whose names had been obtained by the New England Mutual Life Insurance Company in connection with an application for insurance the [54] document entitled, "ATTENDING PHYSICIAN'S STATEMENT"?

A. In answer I refer to my reply to previous Cross-Interrogatory No. 24.

(26) Q. After you had examined the application of Abe Lutz for a policy of life insurance in the New England Mutual Life Insurance Company, did you observe that Dr. Maurice H. Rosenfeld was named by Abe Lutz as his physician, and that he had had a physical examination in August of 1942? A. Yes.

(27) Q. If your answer to cross-interrogatory No. 26 be in the affirmative, please state whether you mailed to Dr. Rosenfeld a copy of the document entitled "Attending Physician's Statement"?

A. No. I did not at any time mail to Dr. Rosenfeld a copy of the document entitled "Attending Physician's Statement."

(28) Q. Please state whether you did at any time mail to Dr. Lissner a copy of the document entitled "Attending Physician's Statement"?

A. No, I did not at any time mail to Dr. Lissner a copy of the document entitled "Attending Physician's Statement."

(29) Q. If your answer to plaintiff's interrogatory No. 40 is that you did approve the application for policy of insurance No. 1,172,844, please state whether such approval [55] was oral or evidenced by a written communication. If the latter, please hand to the Notary Public a copy of such communication and request that it

(Deposition of Harold M. Frost)

be marked Defendants' Exhibit No. 9, and that it be attached to your deposition.

A. Such approval was evidenced by my personal stamp, by my handwritten notations, and by my signature upon the work sheet of the application. This work sheet has already been entered as Plaintiff's Exhibit 1a.

(30) Q. If your answer to plaintiff's interrogatory No. 47 is in the affirmative and such information is in writing, please hand to the Notary Public such document or documents as contain such information and request the Notary Public to mark such document or documents as Defendants' Exhibit No. 10, and request that they be attached to your deposition.

A. In answer I refer to Plaintiff's Exhibits 5 and 6 and to Defendants' Exhibit No. 2.

(Short recess.)

(31) Q. If your answer to plaintiff's interrogatory No. 51 is in the affirmative please describe the routine which is followed by the New England Mutual Life Insurance Company of Boston following the approval by you of an application for insurance and the ultimate issuance of policy No. 1,172,844?

A. With respect to the routine which is followed by the New England Mutual Life Insurance Company following [56] approval by me of an application for life insurance, I refer to my reply to Direct Interrogatory No. 14. With respect to the routine which was followed in the case of Policy No. 1,172,844 and the ultimate issuance of this policy, the routine and the ultimate issuance were as described by me in my reply to Direct Interrogatory No. 14.

(Deposition of Harold M. Frost)

(32) Q. There is attached to these cross-interrogatories a document dated December 14, 1942, being a letter from you to Hays & Bradstreet at Los Angeles, California. Please examine the same and state when you mailed the original.

Please hand the document identified in the last cross-interrogatory to the Notary Public and request that it be marked Defendants' Exhibit No. 11, and attached to your deposition.

A. I mailed the original on December 14, 1942. The pencil notations on this document were not on our communication when it was mailed from the Home Office. This document has already been presented by me to the Notary with the request that it be marked "Defendants' Exhibit No. 11" for identification and that it be attached to my deposition, as indicated in my reply to Cross-Interrogatory No. 10.

(32a) Q. After examining the document, Defendants' Exhibit No. 11, please state what facts and circumstances made necessary the request for obtaining complete detailed statements from Dr. Rosenfeld and Dr. Lissner as recited in Defendants' Exhibit No. 11. [57]

A. The reason for requesting detailed statements from Doctors Rosenfeld and Lissner arises from the fact that Medical Directors have learned from unfortunate experience that the statements of applicants as to their consultations with physicians must be evaluated with caution. Medical Directors are convinced that the average individual intends to be honest. However, we have learned that some applicants apparently attempt to conceal damaging information; that others have not understood the information as to their condition given them by their

(Deposition of Harold M. Frost)

physicians and therefore have not considered it significant; that others have actually not been advised by their physicians as to the significance of serious signs or symptoms which the physician had discovered. Not infrequently a statement from the physician will prove that what appeared an insignificant consultation, from the information given by the applicant in his answers to questions in Part II of his application, was actually a serious matter, the physician having discovered signs and symptoms which would forbid issuance of life insurance at standard rates and might necessitate its issuance at sub-standard rates, or might necessitate rejection of the risk.

As a practical procedure, considerations of expense in obtaining such statements, for which the physicians must be paid by the company, and the delay in issuing policies as a consequence of requesting such statements, [58] influence the Medical Director in formulating his policy as to how frequently and in what types of cases a physician's statement will be required.

In the case of applications for large amounts of insurance, a routine requesting of physician's statements is necessary for the protection of the company as large amounts are at risk. As for small applications, amounts under \$15,000, within which range the great majority of applications fall, the routine requests are neither practical nor feasible because of excessive expense and undue delay in issuing policies.

The only practical policy as respects applications for small amounts of insurance is to request physicians' statements only when the applicant in his statements as to his medical history raises definite doubt as to his insurability.

(Deposition of Harold M. Frost)

Further, it is common knowledge among medical directors that applicants at the older insurance ages, the late fifties and the sixties, must be scrutinized much more carefully as to medical history and condition of health than in the case of applicants of younger ages. Companies generally do not issue to older applicants as much insurance as to younger applicants, because in general the older applicants are not as good physical ratings as the younger applicants.

In the case of Mr. Lutz, when I reviewed his application [59] I noted that he was in his sixty-fifth year, a definitely advanced insurance age. He applied for \$13,000 of insurance. At the same time a request was made for an additional \$13,000 of insurance. For a man as old as Mr. Lutz, \$13,000 of insurance would be considered only a moderate amount to be issued by a company the size of the New England Mutual Life Insurance Company, while \$26,000 of insurance would be considered a large amount to be retained by such a company.

As I had no reason to doubt the accuracy of the statements of Mr. Lutz as to his medical history, I, depending upon his honesty, believed that I could safely approve his application for \$13,000 of insurance without asking for statements from Doctors Rosenfeld and Lissner. His physical examination was satisfactory, and I had no other information of an unfavorable nature as respects his medical history or health. I therefore approved his application for \$13,000.

I believed, however, that, in view of his advanced insurance age, that for his age the amount of \$26,000 life insurance was a large amount to be issued by my company, and the fact that he had admitted consulting Dr.

(Deposition of Harold M. Frost)

Rosenfeld, and to my knowledge had consulted Dr. Lissner, that it would be advisable to request the detailed statement as recited in Defendants' Exhibit No. 11, whereupon this statement was requested.

(33) Q. Is it not a fact that on December 14, 1942, the [60] Medical Department of the New England Mutual Life Insurance Company felt that the health and condition of Abe Lutz was not acceptable as an insurance risk in the absence of a complete detailed statement from Dr. Rosenfeld and Dr. Lissner as to their treatment of Abe Lutz.

A. No. I had no reason to doubt his health and condition. His medical history, as he had given it in Part II of his application, was favorable. His examination was satisfactory. I had no facts from any other source which threw any doubt upon his medical history. It is a fact that I was not willing to approve his application for additional insurance until I had received satisfactory statements from his physicians. The reason for this unwillingness appears in my reply to previous Cross-Interrogatory No. 32a.

(34) Q. What information, if any, had you acquired between November 16, 1942, and December 14, 1942, which, in your opinion, made necessary the requirement that a complete detailed statement such as is referred to in Defendants' Exhibit No. 11 be obtained from Dr. Rosenfeld and Dr. Lissnes?

A. In the letter from the Medical Director of the Equitable Life Assurance Society dated November 25, 1942, and entered as Plaintiff's Exhibit No. 4, it was indicated that Dr. Lissner had been consulted by Mr. Lutz as well as Dr. Rosenfeld. This fact was not known to

(Deposition of Harold M. Frost)

me before, as [61] Mr. Lutz had not mentioned Dr. Lissner in his application. Having become aware of this fact, I included Dr. Lissner in the request for an attending physician's statement of December 14, 1942, as given in Defendants' Exhibit No. 11. I had acquired no other information. The reason for requesting the statement appears in my reply to Cross-Interrogatory No. 32a.

(35) Q. When you failed to receive the statements as required in your letter, Defendants' Exhibit No. 11, from Dr. Rosenfeld and Dr. Lissner, you recommended, did you not, that the application of Abe Lutz for additional insurance be rejected? A. Yes.

(36) Q. Is it not a fact that if the requested statements designated in Defendants' Exhibit No. 11 had been furnished and they were satisfactory you would have approved the issuance of an additional policy of insurance for \$13,000 to Abe Lutz?

A. No. While I would have been satisfied, from the medical angle, as to the insurability of Mr. Lutz for the additional \$13,000 of insurance if the said physicians' statements had been submitted and had proved acceptable, there was another reason to doubt whether Mr. Lutz was insurable for the additional \$13,000 of insurance.

I refer to the letter written on December 1, 1942, by Doane Arnold, Manager of the Underwriting Department, to [62] Messrs. Hays & Bradstreet, a part of Defendants' Exhibit No. 5, advising that we would consider him for the additional \$13,000 of insurance subject to evidence of an adequate insurable interest, together with a new Part I of the application and physicians' statements.

On December 1, 1942, we doubted whether there was adequate insurable interest with respect to this additional

(Deposition of Harold M. Frost)

\$13,000 of insurance. Other information which came to us later so increased this doubt as to convince us that we would not be justified in issuing this additional \$13,000, even though the requested physicians' statements were received and proved satisfactory.

As a matter of fact, on April 5, 1943, Harold P. Morgan wrote Dr. Frederick R. Brown, Associate Medical Director, asking us to give further consideration for the additional \$13,000 cited above, and for even more, up to our limit at the age of Mr. Lutz.

We received this letter on April 7, 1943. It appears on the reverse side of the telegram of April 8, 1943, which is in as a part of Defendants' Exhibit No. 5.

I hand said letter to the Notary and request that it be marked "Plaintiff's Exhibit 7" for identification, and that it be attached to my deposition.

(Letter dated April 5, 1943, from Harold P. Morgan to Dr. Frederick R. Brown, is marked as Plaintiff's Exhibit 7 for identification.) [63]

On April 8, 1943, we wired the New England Mutual Life Insurance Company at Los Angeles that we must decline because of additional confidential information which we had received since we issued Policy No. 1,172,844. That telegram is a part of Defendants' Exhibit 5.

This confidential information had no bearing upon the medical history or health of Mr. Lutz. In fact, when the wire cited above was sent on April 8, 1943, we had received no information of any sort throwing doubt upon the medical history or health of Mr. Lutz. It was not until after his death that, as a result of our investigation, information was discovered which threw serious doubt

(Deposition of Harold M. Frost)

upon his medical history. This information cited in our telegram of April 8, 1943, consisted of two MIB confidential reports, one received by us on January 5, 1943, the other in March, 1943, both of them to the effect that Mr. Lutz was suspected of trying to get more life insurance than he was entitled to from the point of view of insurable interest. These two reports, added to the doubt already in our minds as to the insurable interest, as cited above, constrained us to refuse to proceed further.

(37) Q. Referring again to Defendants' Exhibit 11, please state whether you were following the routine practice and usage of the New England Mutual Life Insurance Company of Boston as the same prevailed during the months of November and December, 1942, in requiring statements of the type [64] requested in Defendants' Exhibit No. 11? A. Yes.

(38) Q. If your answer to cross-interrogatory No. 37 is that you were not following the usual practice and custom of New England Mutual Life Insurance Company of Boston as the same prevailed during the months of November and December, 1942, in requesting the statements above mentioned, please state what circumstances made necessary the requesting of such requirements as set forth in Defendants' Exhibit No. 11?

A. See answer to previous Cross-Interrogatory No. 37.

(39) Q. Is it not a fact that in considering the application of Abe Lutz for additional insurance during the month of December, 1942, you were not satisfied with the information appearing on the application (Plaintiff's Exhibit 1) and the medical report of Dr. Waste (Plaintiff's Exhibit 2) and for that reason you required

(Deposition of Harold M. Frost)

full and complete information from the attending physicians, Dr. Rosenfeld and Dr. Lissner?

A. No. In answer I would refer to my reply to Cross-Interrogatory No. 32a.

(40) Q. If your answer to cross-interrogatory No. 39 is in the negative please give the reasons why you did not request full and complete statements of the character set forth in Defendants' Exhibit No. 11, from Dr. Rosenfeld and Dr. Lissner prior to the time that you approved the issuance of policy No. 1,172,844. [65]

A. In answer I refer to my reply to Cross-Interrogatory No. 32a.

(41) Q. Please state whether you personally knew Abe Lutz, the insured named in policy No. 1,172,844?

A. No.

(42) Q. Please state if you at any time prior to the issuance of policy No. 1,172,844, heretofore identified, personally examined Abe Lutz, the insured, with reference to his application for insurance? A. No.

The Court: What does "MIB Confidential Reports" mean?

Mr. McGinley: That, your Honor, stems from the Medical Information Bureau, which is the central clearing house for all major insurance companies.

The Court: I assumed it was, but the record did not show. May it be stipulated that "MIB" refers to "Medical Information Bureau"?

Mr. Herndon: Yes.

Mr. McGinley: So stipulated.

(43) Q. There is attached to these cross-interrogatories a document in the form of a letter dated January 14, 1943, from F. R. Brown, Associate Medical Director,

(Deposition of Harold M. Frost)

addressed to Messrs. Hays & Bradstreet, which please examine, and state whether you have previously seen said document. Please hand the document dated January 14, 1943, to the Notary Public and [66] request the Notary to mark the letter just identified as Defendants' Exhibit 12 for identification; and that the same be attached to your deposition.

A. Said document has already been handed to the Notary and marked Defendants' Exhibit No. 12 for identification, to be attached to my deposition. See answer to Cross-Interrogatory No. 10.

(44) Q. Directing your attention to Defendants' Exhibit No. 12 please state if you are personally acquainted with Mr. F. R. Brown? A. Yes.

(45) Q. If your answer to cross-interrogatory No. 44 is in the affirmative, please state if F. R. Brown was employed in the Medical Department of the New England Mutual Life Insurance Company during the month of December, 1942? A. Yes.

(46) Q. During the months of November and December, 1942, how many Medical Directors, to your knowledge, were employed by New England Mutual Life Insurance Company of Boston at its Home Office in Boston?

A. Three medical directors were employed by the New England Mutual Life Insurance Company during the months of November and December, 1942.

(47) Q. Please name the officer of the New England Mutual Life Insurance Company of Boston during the months of November and December, 1942, from whom you received instructions as to your employment and duties.

(Deposition of Harold M. Frost)

A. George Willard Smith, President, New England Mutual Life Insurance Company.

(48) Q. Is it not a fact that your duties in connection with your employment by New England Mutual Life Insurance Company are confined to the Medical Department of said company? A. Yes.

(49) Q. There is attached to these cross-interrogatories a document, being a telegram dated December 29, 1942, addressed to New England Mutual Life Insurance Company, 609 South Grand Avenue, Los Angeles, California, which please hand to the Notary Public and request the Notary to mark as Defendants' Exhibit 13 for identification and attach the same to your deposition?

A. Said document has already been handed to the Notary, to be marked Defendants' Exhibit No. 13 for identification and to be attached to my deposition. See answer to Cross-Interrogatory No. 10.

(50) Q. Please examine the telegram identified in cross-interrogatory No. 49, and state whether you are the author of said telegram?

A. I was not the actual author of the telegram, though it was sent in accordance with my determinations.

(51) Q. Are you employed by the New England Mutual Life Insurance Company under an oral contract or a written contract? [68]

A. I am employed under an oral contract.

(52) Q. If your answer to cross-interrogatory No. 51 is that you are employed under a written contract, please hand to the Notary Public a copy of your contract of employment, ask the Notary Public to mark it as Defendants' Exhibit No. 14, and attach the same to your deposition.

A. See answer to Cross-Interrogatory No. 51.

(Deposition of Harold M. Frost)

(53) Q. Please state whether you were furnished a copy of plaintiff's interrogatories to examine prior to the time that you personally appeared before the Notary Public to answer the same? A. Yes.

(54) Q. If your answer to cross-interrogatory No. 53 is in the affirmative, please state the name of the person from whom you received the interrogatories?

A. Vincent V. R. Booth, Esq., attorney for the New England Mutual Life Insurance Company.

Mr. McGinley: As part of the cross examination, your Honor, of the witness Frost, the defendants and counter-claimant offer in evidence the documents which are referred to on the cross examination.

Mr. Herndon: If your Honor please, we make a general objection to those documents. I am perfectly satisfied to allow your Honor to rule on them with a general objection. If your Honor prefers, I can take them separately. [69]

The Court: What is the nature of the general objection?

Mr. Herndon: My objection to the correspondence between Harold P. Morgan and the home office of the plaintiff, is that it is immaterial in that it has no tendency to prove any issue in this case with respect to any matter of waiver or estoppel, in that all such correspondence appears on its face to be corroborative of the matter stated in the application of the insured.

With respect to all correspondence subsequent to December 1, 1942, the date of the issuance of the policy, we submit that it is immaterial; has no relation to the issuance of the policy in suit; that no information contained in any of the letters has any tendency to prove any fact with

respect to knowledge that the answers of the insured were false, and there is no foundation sufficient to show that Harold P. Morgan is an agent, an authorized agent of plaintiff.

I make that same objection to each of the documents offered by defendants.

The Court: Do you mean that it is your position that Morgan was not an agent of any kind, even a soliciting agent for the company?

Mr. Herndon: We stipulated that Mr. Morgan is an employee of Hayes & Bradstreet, who are given the title, and sometimes called "General Agents"; however, the authority of [70] Hays & Bradstreet is strictly limited under the contract of agency which we have. We do not concede that Hays & Bradstreet had any authority to bind the company, their authority being limited to the soliciting of policies of insurance and the collection of premiums on policies. That essentially is the extent of their authority.

The Court: Of course, it is pretty hard to draw a line in a suit of this kind. I don't think there becomes directly involved the question of the authority of a general agent as distinguished from a soliciting agent, because it is apparent that Morgan was very anxious, as probably were his principals, to get additional insurance through so he could get his premium; but as a matter of fact, apparently the company did not consider themselves bound by anything he said, because they did not issue the additional insurance; so that's that; and this is not a suit against Morgan for misrepresentation or against his principals for that purpose. As I understand the issues here raised by the defendant, that assuming the contention of plaintiff to be sound from a legal and factual standpoint, and proved, that even so the plaintiff has waived

its right, or that it is estopped from asserting either, 1. The invalidity ab initio of the policy, or 2. Any fraud occurring in its original issuance. Is that so?

Mr. McGinley: That is correct, your Honor.

The Court: Now, here evidence is produced of [71] information purportedly furnished by an employee, or at least soliciting agents, which may throw light on the entire matter. It is very difficult for the court, under the rules of federal procedure, to draw a strict line. My general view is that the evidence is admissible under our federal rules. I shall accept it, however, with material reservations for further study, and subject to a motion to strike out. It is my understanding that you both wish to introduce in evidence the interrogatories, and the answers thereto, and the cross interrogatories, and their answers thereto, and that the defendant wishes also the admission of the exhibits to the cross interrogatories, and plaintiff wishes the admission of the exhibits to their interrogatories?

Mr. Herndon: Yes, your Honor.

The Court: Subject to a motion to strike they will all be admitted. I will ask the clerk to be very careful in putting these exhibits in here to see that they may be opened up so they may be easily examined and then filed afterward.

You desire for the admission to include also the stipulation which precedes the interrogatories, I presume?

Mr. Herndon: Yes.

The Court: The documents which are marked 3-A and marked 3-B will be received.

(Whereupon an adjournment was taken until 2:00 o'clock p. m., Wednesday, March 28, 1945.) [72]

(March 28, 1945.)

AFTERNOON SESSION

2:00 O'CLOCK.

Mr. Herndon: If your Honor please, during the noon recess counsel for plaintiff and defendants agreed that the exhibits offered just before the close of the last session of court might bear designation as follows: The stipulation for the taking of the deposition of Dr. Frost, to which are attached the interrogatories and cross interrogatories has been marked Plaintiff's Exhibit No. 26. The deposition that is the answers of the witness to the interrogatories and cross interrogatories may be marked as Plaintiff's Exhibit 27. That Exhibit 27 also includes those exhibits for identification in the deposition which were offered by plaintiff. They are Plaintiff's 1, 2, 3, 4, as identified in the deposition. The exhibits attached to the deposition of Dr. Frost, which were offered by defendants and counterclaimant have been marked Defendants' Exhibit D, and they are in evidence.

The Court: So stipulated?

Mr. McGinley: So stipulated. [73]

* * * * *

Mr. McGinley: If your Honor please, the next witness to be called was Harold Morgan, and a situation has developed there with regard to his not appearing here, which I believe I should call to the attention of the Court; Mr. Morgan is an employee of Hays & Bradstreet, and prior to the time of trial I took a brief deposition, principally with regard to laying the foundation for the introduction of the exchange of correspondence between the local office and the home office of plaintiff. I also subpoenaed him to be here as a witness. Yesterday

counsel for plaintiff handed me a letter dated March 27, 1945, from Doctor Guy van Scoyo, 1020 Associated Realty Building, Los Angeles, which reads as follows: "To Whom It May Concern: This will certify that Mr. Harold P. Morgan is under my professional care; at the present time he is in Saint Vincent's Hospital suffering from hemorrhages of the stomach. It will be impossible for him to appear in court for at least sixty days, inasmuch as an operation is contemplated." And that is signed by the doctor.

Rather than request a continuance, your Honor, even though the deposition is fragmentary compared to what I otherwise would have gone into in the event I knew he was not going to be available, counsel has suggested to me that they would waive the signing and correction of the deposition, [74] and if it meets the convenience of the Court, under the circumstances, I will read the deposition of Mr. Morgan.

Mr. Herndon: Yes, your Honor, counsel has correctly stated the matter. I might supplement it to this extent, that we too had expected the witness to be here, and our failure to cross examine him was due to our supposition that he would be in court.

The Court: It is just one of those unfortunate things which cannot be helped. Let us see what there is in the deposition. We will accept the stipulation, and you may proceed to read the deposition.

Mr. Herndon: I take it counsel will stipulate that the Court may take into consideration, in weighing the testimony, all of the circumstances, including those stated

by counsel, and the fact that the deposition has not been signed and corrected, and the failure to cross examine is due to the circumstances mentioned.

Mr. McGinley: So stipulated. In connection with the deposition about to be read, your Honor, and merely for the limited purpose of identifying Harold P. Morgan in connection with other evidence which will be introduced, we offer in evidence at this time a letter on the stationery of the New England Mutual Life Insurance Company, Boston, dated December 31, 1942, addressed to Mr. Stanley Leeds, and signed Harold P. Morgan, and I would like to inquire if it will be stipulated by counsel, on examination of this [75] document, if this letter bears the signature of Harold P. Morgan?

Mr. Herndon: Yes, we will stipulate that it does.

Mr. McGinley: For the limited purpose which I have stated, I will therefore offer in evidence the letter dated December 31, 1942.

Mr. Herndon: Plaintiff objects to the offer, your Honor, on the ground it is immaterial, and on the further ground that it is not binding on the plaintiff, and that no proper or sufficient foundation has been laid to prove that it would be binding on the plaintiff.

The Court: Let me see the letter, Mr. Clerk. It is merely cumulative. It is all in the record, anyway.

Mr. McGinley: Yes, your Honor. If your Honor might reserve a ruling on it?

The Court: Let it be marked for identification.

The Clerk: Defendants' Exhibit E.

Mr. McGinley: I am reading the deposition of Harold P. Morgan, called as a witness on behalf of the defendants and counter claimant, taken on Friday, March 2, 1945, commencing at 9:30 o'clock a. m., at the offices of McLaughlin & McGinley, Esqs., Los Angeles, California, before William H. Davis, a Notary Public in and for the County of Los Angeles, State of California, pursuant to the annexed stipulation.

Appearances, for the plaintiff, Messrs. Meserve, [76] Mumper & Hughes, by Leo E. Anderson, Esq., 615 Richfield Building, Los Angeles, California.

For the defendants: Messrs. McLaughlin & McGinley, by John P. McGinley, Esq., 1224 Bank of America Building, Los Angeles, California.

(Deposition of said Harold Morgan was here read by Mr. McGinley.)

HAROLD MORGAN,

called as a witness by and on behalf of defendants and counter-claimant, being first duly sworn, was examined and testified as follows:

(Discussion off the record.)

Mr. McGinley: See if I state it correctly, then, Mr. Anderson. May the record show that at this time the deposition of Mr. Harold Morgan is being taken by the defendants and the counter-claimant, with the understanding that if a foundation is shown by the testimony of this witness or other evidence such as to make Mr. Morgan the agent of the plaintiff, that the propriety of taking the deposition of Mr. Morgan as the agent of the plaintiff will be passed upon by the trial court at the time of trial.

(Deposition of Harold Morgan)

Mr. Anderson: Well, my position is that I am perfectly willing to stipulate that his deposition be taken at this time without getting out notice and subpoena, but I don't concede the right of the defendants to take the deposition, in any other capacity except as their own witness.

[77]

Mr. McGinley: Yes, I understand your position, Mr. Anderson. And so that that issue may not be passed upon here, so that neither one of us is prejudiced, may we have the understanding that the trial court may pass upon the question of his capacity as an agent for the plaintiff or otherwise at the time of trial?

Off the record.

(Discussion off the record.)

Mr. Anderson: For the record, my previous statement is the position that I would take on this. I am perfectly willing to have the deposition taken without notice or subpoena, but the question as to whether or not he is your witness or an agent of the plaintiff is something that I am not willing to stipulate on now.

Mr. McGinley: That is satisfactory, Mr. Anderson. The only purpose of my statement was to make clear that the question of whether or not he is a witness on behalf of the defendants and counter-claimant, or whether or not the defendants and counter-claimant may take advantage of any statements in the form of admissions made as binding the plaintiff, be left open to the trial court.

Mr. Anderson: Well, you are taking it at your own risk. Whatever happens to it will be your responsibility. I am not going to stipulate that you can or can't.

Mr. McGinley: Well, I think we are in agreement, so I am satisfied. [78]

(Deposition of Harold Morgan)

The Court: In order that there may be no misunderstanding on the part of anyone, it is my understanding from the stipulation that an attempt is here made to call the witness Morgan under the Federal rules, which entitle you to call certain of the opposite parties for examination without being bound by their testimony. The plaintiff refuses to concede that relationship between Morgan and the plaintiff is such that it entitled him to be called under that rule. Therefore, you call him, as indicated, at your peril. If he is not one who is covered under the rule, then he becomes your witness and you are bound by his testimony, when you offer it. If he does come under the rule, you are not bound by his testimony.

Mr. McGinley: That statement is satisfactory.

Mr. Herndon: That is correct, your Honor.

Direct Examination

By Mr. McGinley:

Q. Mr. Morgan, what is your business?

A. I am in the life insurance business.

Q. And do you have an office? A. Yes.

Q. Where is your office?

A. 609 South Grand Avenue, Los Angeles.

Q. Do you conduct your business as an individual or are you an associate or a partner of some other person?

A. I am the brokerage manager for Hays & Bradstreet. [79]

Q. And is Hays & Bradstreet the firm name under which you do business? A. That's right.

Q. How long have you been in the insurance brokerage business? A. Ten years last January 2nd.

(Deposition of Harold Morgan)

Q. And during that period of ten years, have your services and activities been in the City of Los Angeles?

A. Yes.

Q. What business relationship, if any, does the firm of Hays & Bradstreet have with the New England Mutual Life Insurance Company of Boston, Massachusetts?

Mr. Anderson: I object to that on the ground the witness is not qualified to answer that question.

Q. By Mr. McGinley: Do you know whether or not Hays & Bradstreet, the firm with which you are employed or associated, has any business relations with the New England Mutual Life Insurance Company of Boston, Massachusetts? A. Yes, they do.

Q. And what is that relationship?

Mr. Anderson: I don't think an employee is qualified to testify as to the relationship between his employer and someone else.

Mr. McGinley: I suppose in the last analysis, Leo, it calls for a legal opinion as to his interpretation of [80] whatever business relations there are between Hays & Bradstreet, and maybe I can get at it this way.

Q. What are your duties as an employee of Hays & Bradstreet?

A. The promotion of brokerage business with life agents and general insurance men in Los Angeles, in an effort to bring their business to our office, their surplus business.

Q. And does the firm of Hays & Bradstreet place insurance business with the New England Mutual Life Company?

(Deposition of Harold Morgan)

A. Well, they don't place it. I don't quite understand that question. We merely take an application and forward it to the New England Mutual.

Q. Do I state it fairly in this way, then, Mr. Morgan: When an applicant makes application for insurance with the New England Mutual Life Company, and if they avail themselves of your services as broker or general agent, you transmit the application through your office in Los Angeles to the head office of the New England Mutual Life Insurance Company of Boston, Massachusetts?

A. Yes.

Mr. Herndon: If your Honor please, we object to that question upon the ground that it assumes a fact not in evidence, that the office of Hayes & Bradstreet is a general office, or general agent.

The Court: May it be stipulated that "or general [81] agent" contained in the question be deleted, and the question stand as he has testified, your Honor?

Mr. McGinley: Yes. May I inquire from counsel as shown on the document which is identified, wherein Mr. Morgan is referred to as assistant general agent, if in deleting the words "general agent" the expression "assistant general agent" may stand in the question?

Mr. Herndon: No, if your Honor please. I think the suggestion made by your Honor is accomplished by the succeeding question where the words "general agent" are deleted from the personal description.

The Court: The same question, but those words taken out?

Mr. Herndon: Yes, and we will not object to the question.

The Court: Very well, the stipulation is received with the words "or general agent" deleted.

(Deposition of Harold Morgan)

Mr. Herndon: May the answer be stricken to the last question? We move to strike it?

The Court: We will leave it by leaving the words "or general agent", and just leave the answer.

Mr. McGinley: Well, I will ask the same question, deleting the descriptive characterization "general agent."

Would your answer be the same? A. Yes.

Q. During the year 1942, were you acquainted with a [82] life insurance agent by the name of Stanley Leeds?

A. Yes.

Q. How long had you known Mr. Leeds prior to the year 1942?

A. Oh, several years. I am not sure exactly how long.

Q. Is he one of the persons which would come within the description of parties from whom you promoted business? A. Yes.

Q. During the year 1942 did you have occasion to discuss with Mr. Leeds the application of a party by the name of Abe Lutz for life insurance in the New England Mutual Life Insurance Company of Boston, Massachusetts? A. Yes.

Q. When did you have your first conversation with Mr. Leeds relative to a policy of life insurance or an application for life insurance by Mr. Abe Lutz?

A. I think it was some time in November of 1942.

Q. And where did the conversation take place?

A. As nearly as I recall, it was on the telephone or in my office; I don't remember which.

Q. And what would your recollection be as to the approximate date in November?

A. I think it was the latter part of November.

(Deposition of Harold Morgan)

Q. At that time was there anyone present besides [83] yourself and Mr. Leeds? A. Not that I recall.

Q. What was the conversation?

Mr. Anderson: Just a minute. What is the purpose of the question? It would be entirely hearsay so far as the plaintiff is concerned.

Mr. McGinley: Well, that is begging the same question that we had at the start of the deposition, Leo, and until all the evidence is in, I am not in a position right now to say what foundation will be laid so as to make his testimony binding on the plaintiff. I believe that I can show that Mr. Morgan's testimony in the respects that will be brought out later on in the form of admissions is binding on the plaintiff, and I think that would overcome the objection of hearsay.

Mr. Anderson: Quite frankly, John, I will tell you what our position is right now. It will probably save a lot of time. It is our position that Hays & Bradstreet are not in a position to bind the New England Mutual by any statements.

Mr. McGinley: Yes. I know what your position is, Leo.

Mr. Anderson: And I think the evidence will bear it out.

Mr. McGinley: May we continue, Leo? Just in the interests of expediency, in view of the fact that the trial [84] is on the 27th, to save a lot of work, of going up and getting a ruling on it, make the objection, but allow the witness to answer, reserving your right to have the Court rule on it at the time of trial. The only reason I make that observation is this: We don't have that much time left between now and the time of trial, and if I have to

(Deposition of Harold Morgan)

adjourn this deposition so that the matter may be brought before Judge Jenney, it means about a ten-day delay. My purpose in taking Mr. Morgan's deposition this morning is to see whether or not we can get together on a stipulation of certain facts. Now, I don't see that the suggestion I made will prejudice you in any way, because this testimony can't be read anyway, and your point is reserved.

Mr. Anderson: Well, so far as this conversation with Leeds and taking the application are concerned, I don't think that is of much materiality one way or the other. I have no objection to his answering that question, but I simply want to make the record clear at the start.

Mr. McGinley: Suppose you make the objections, Leo, and I will stipulate that any other objections that you have, that you don't state, are reserved to you until the time of trial. But for the reasons which I have mentioned, and in view of the nearness of the trial date, I think that probably that is the better way to handle it.

Mr. Anderson: Well, it all depends on what your questions go to. As far as this question here is concerned, [85] I have no objection to his answering, outside of the objection I have stated.

The Witness: The question was whether we were alone?

Q. By Mr. McGinley: No. I asked you for the conversation between you and Mr. Leeds on the first occasion when you discussed the application of Mr. Lutz for insurance.

A. It is a little difficult to reconstruct, because we have literally hundreds of those conversations, and I don't remember the exact conversation except that he ap-

(Deposition of Harold Morgan)

proached me, asking if I thought the Company would be interested in entertaining with favor this application on Mr. Lutz. And upon ascertaining the facts from him, I wrote the Company and asked them if they would care to consider this case.

Q. Now, what did Mr. Leeds tell you? You mentioned, in response to my question, that upon ascertaining the facts you wrote the Company. Now, what, as near as you can now recall, did Mr. Leeds tell you?

A. Well, as I recall, some business had been placed in the Equitable, which is Mr. Leeds' company, and additional insurance had been refused. I think that's the story. And being additional business to place, he asked me if I would submit it to the home office to see if they would accept that amount that had been refused by the Equitable.

Q. And what was the amount? A. \$13,000.
[86]

Q. Have you given as near as you can recall all of the conversation that you had with Mr. Leeds?

A. Yes, I think I have.

Q. On the occasion of that conversation, did he hand you an application filled out by Mr. Lutz?

A. I don't remember. My correspondence may help me to answer that.

Apparently not.

Q. And following that conversation, what did you next do with reference to contacting the New England Mutual Life Insurance Company?

A. I wrote them a letter and in this letter I said that there was some history in the case, and as a consequence the local office of the Equitable wired their home office to

(Deposition of Harold Morgan)

turn all papers over to the New England Mutual, and in a wire just received the Equitable stated they would be glad to do so, except they would prefer that our home office make this request of the home office of the Equitable. And I asked them to get in touch with them to secure the necessary papers.

Q. That was about what date, Mr. Morgan?

A. That letter is dated November 16, 1942.

Mr. McGinley: At this time, your Honor, I wish to offer in evidence the letter dated November 16, 1942, from Harold P. Morgan to Mr. Doane Arnold, Manager, Underwriters Department, New England Mutual Life Insurance Company, Boston, [87] Massachusetts. I should state that counsel and I have agreed that there will be no objection to the use of photostatic copies, or that the copies used are not the original documents.

Mr. Herndon: If your Honor please, we object on the ground that the document now offered is already in evidence over our objection, as part of Defendants' Exhibit D, I believe.

The Court: I understand it is already in.

Mr. McGinley: There is a group of letters, your Honor. I believe it included this one, which went in evidence as part of the cross examination of the witness Frost, but in the interest of continuity and completeness, and inasmuch as the document has not been offered separately as an exhibit, I would like to offer the entire exchange of correspondence between Morgan and the home office at this time.

The Court: Let it be marked for identification, and the ruling of the Court, if it is not already in, will be that it just remain for identification. It will be admitted

(Deposition of Harold Morgan)

in evidence if it is already in. It will just remain in for identification.

Q. And did you receive a reply, either by telegram or by letter, in response to your letter of November 16, 1942?

A. Well, I followed it up with a letter to the same [88] party at the home office, dated November 17th, in which I enclosed an application for \$13,000 and an examination by Dr. Waste of the Equitable.

Q. Now, in the letter of November 17th, you say you enclosed what documents?

A. An application completed in the amount of \$13,000 and a medical examination that had been completed by the chief examiner here for the Equitable, Dr. Waste.

Mr. McGinley: At this time, as defendants' and counter claimant's exhibit next in order, we offer in evidence letter dated November 17, 1942, from Harold P. Morgan to Mr. Doane Arnold, Manager Underwriting Department, New England Mutual Life Insurance Company, Boston, Massachusetts.

The Court: Same objection and same ruling, and it may be marked for identification.

Mr. McGinley: May I inquire if counsel will stipulate that the matter commencing on page 11, line 9, to page 12, line 2, be deleted, inasmuch as it refers to the identification of Parts 1 and 2 of the application, and they have already been introduced in evidence.

Mr. Herndon: Yes, I so stipulate.

The Court: The stipulation will be received.

Q. What next was done by you in connection with the application of Abe Lutz for insurance with the plaintiff company? [89]

A. Well, the office received a wire in which the underwriting department advised that the case had been ap-

(Deposition of Harold Morgan)

proved for \$13,000, and that a letter was following regarding additional. In my letter of November 17th I asked them if they would issue additional insurance in the amount of \$13,000.

Q. And do I state the sequence correctly, that in response to your letter of November 17, 1942, you received a wire addressed to Hays & Bradstreet?

A. No. The wire is addressed to New England Mutual Life Insurance Company.

Q. At what address?

A. 609 South Grand Avenue.

Q. And did that wire come to your attention?

A. Yes.

Q. What is the date of that wire?

A. December 1st.

Q. 1942? A. 1942.

Q. After the receipt of the wire on December 1, 1942, what next was done by you in connection with the application of Abe Lutz for insurance with the plaintiff company?

A. Well, I presume that I called Mr. Leeds and told him of the receipt of the wire. The next letter was received by us on December 4th, addressed to Hays & Bradstreet. [90]

Mr. McGinley: At this time, your Honor, I offer in evidence as defendants' and counter-claimant's next exhibit in order, telegram addressed to New England Mutual Life Insurance Company, 609 South Grand Avenue, Los Angeles, from the Underwriting Department. It bears the signature "Underwriting Department", as our next exhibit.

Mr. Herndon: Same objection.

(Deposition of Harold Morgan)

The Court: Same ruling. Mark it for identification next in order, with the understanding that it becomes in evidence if it is not already in.

The Clerk: Defendants' Exhibit H.

Mr. McGinley: Mr. Anderson, I note that Mr. Morgan is refreshing his memory from his office file, and apparently the documents which he has constitute his office file. Is it agreeable to you that in lieu of being furnished with a copy of these documents, that Mr. Morgan read into the record the contents of the telegram and the letters to which I have referred?

Mr. Anderson: I have no objection, except that we may save a lot of time and space here by getting the substance of it, reading into the record the substance of the letters, rather than trying to read these long letters word for word. You can have the whole thing read in if you want to.

(Discussion off the record.)

Mr. McGinley: Then it is stipulated, Mr. Reporter, that as part of this deposition you will have photostatic [91] copies made of the interchange of correspondence and wires referred to by Mr. Morgan, and return the originals to Mr. Morgan and furnish Mr. Anderson and myself with photostatic copies at our expense.

Mr. Anderson: That stipulation is subject to my objection as to materiality, and as to the authority of the witness to testify in these matters.

Mr. McGinley: Yes; all right.

Q. Now, will you kindly turn to the wire of December 1, 1942. I observe that this last mentioned wire, Mr. Morgan, recites that a letter will follow regarding additional, signed "Underwriting Department." Did you

(Deposition of Harold Morgan)

receive a letter from the home office of the plaintiff company subsequent to the wire of December 1, 1942?

A. Yes.

Q. And do you have that letter with you, Mr. Morgan? A. Yes.

Q. Do you have it in the file which you now have in your hand? A. Yes.

Q. Would you kindly turn to that letter?

A. Yes.

Q. What is the date of that letter?

A. December 1st.

Q. I may have misunderstood you. I understood you received a wire on December 1, 1942. Did you also receive [92] a letter under the same date?

A. I received the letter three days later, on December 4th. I received the wire—well, I can't tell whether it was a night letter or a fast message, but the wire and the letter are dated the same, December 1, 1942.

Q. I see.

Mr. McGinley: This is awkward, but I don't see how I am going to get away from reading the telegram in, because it serves as a foundation for some questions. With your permission and subject to your objection, Mr. Anderson, I will ask Mr. Morgan to read the letter which he received December 4, 1942, and which is dated December 1, 1942, from the plaintiff company.

Mr. McGinley: At this time, your Honor, as defendants' and counter-claimant's exhibit next in order, we offer in evidence letter from New England Mutual Life Insurance Company, dated December 1, 1942, from the manager of the Underwriting Department.

Mr. Herndon: Same objection.

(Deposition of Harold Morgan)

The Court: That is already in as part of that exhibit?

Mr. Herndon: Yes.

The Court: Same ruling.

The Clerk: I for identification.

The Witness: In its entirety?

Mr. McGinley: Yes. [93]

The Witness: It is addressed to Messrs. Hays & Bradstreet, from Underwriting Department: Subject: Abe Lutz, Policy No. 1172844:

"We have wired you today as per the attached confirmation and wish to advise that we would be willing to consider this risk for \$13,000 of additional insurance subject to new Parts One and evidence of an adequate insurable interest also satisfactory statements from both Dr. Rosenfeld and Dr. Lisner will be required giving full details of their treatment of this applicant in the past."

That letter is signed by an underwriter in the Underwriting Department.

Q. By Mr. McGinley: Mr. Doane Arnold?

A. Well, it is signed by an underwriter. Doane Arnold is the manager of the Underwriting Department. The letter is signed, apparently, by S. L. Hamlin, Underwriter.

Q. Now, after the receipt of the letter which you have just read into the record, did you communicate with Stanley Leeds? A. Yes, I did.

Q. And was that by telephone conversation or written communication?

A. Apparently by telephone conversation.

(Deposition of Harold Morgan)

Q. And what is your recollection as to the date when you talked to Mr. Leeds?

A. We try to handle these things promptly. I most [94] likely talked to him on the 4th of December.

Q. On the telephone? A. Yes.

Q. What was the conversation?

A. I don't recall. I undoubtedly read him the letter.

Q. The letter dated December 1, 1942?

A. Yes.

Q. And what was his response, if any?

A. I don't remember. So many of these things are handled, it is impossible to bring up the specific conversation that we had.

Q. Your present recollection is that you don't recall anything other than what you testified to?

A. That's right.

Q. What next was done by you, Mr. Morgan, in connection with the application of Mr. Lutz for insurance with the plaintiff company?

A. Subsequent letters give some light on our conversations that I had with Mr. Leeds, and that is another reason that it unfolds as we go along.

Q. Feel free to refresh your memory from anything that you have in the file, Mr. Morgan.

A. Yes. Well, I find a letter written to the manager of the Underwriting Department at the home office, dated December 8, 1942, regarding Abe Lutz; subject: Additional [95] insurance; and in that letter I acknowledge receipt of his letter of December 1st; and there was a discussion that the proposed insured's son, Harry Lutz, would be the owner of this additional insurance; and it further indicates that that had been forwarded to the home office on the 7th of December.

(Deposition of Harold Morgan)

Q. In other words, the next step by you was the forwarding of a letter under date of December 8th, 1942, to the home office, after you had talked to Mr. Leeds?

A. Yes, that's right.

Mr. McGinley: At this time, your Honor, as defendants' and counter-claimant's next in order, we offer letter dated December 8, 1942, from Harold P. Morgan to Mr. Doane Arnold, Manager Underwriting Department, New England Mutual Life Insurance Company, Boston, Massachusetts.

Mr. Herndon: Same objection.

The Court: Same ruling.

Mr. Herndon: We might add to the objection that it appears on the face of the offered instrument that it was written subsequent to the date of the issuance of the policy in suit.

Mr. McGinley: Your Honor, apropos of that comment, so that the relevancy of this correspondence may be emphasized, as part of the pre-trial memorandum, the question was raised as to what law would apply, the law of California or the law of some other jurisdiction, and I think counsel and I are in agreement that the law of California should apply. Now, [96] if that is the case, it is bottomed on the fact that the binding contract which is involved in this litigation became a binding contract, not on the date of the issuance of the policy, but the delivery of the policy to the beneficiary or the insured, in California, and the pre-trial stipulation fixed the date of delivery as between the 7th and 9th. Of course, this letter just introduced predates the making of the contract.

The Clerk: This is marked for identification only?

(Deposition of Harold Morgan)

The Court: This same letter was part of that other file which went into evidence, subject to a motion to strike?

Mr. Herndon: Yes, your Honor.

The Court: Same ruling. Mark it for identification. That's what you have been doing with all of them?

The Clerk: Yes.

Q. I observe from just casually reading the December 8, 1942, letter that reference is made to the enclosure of a copy of a form from the Equitable files. Is that correct?

A. Yes. I hadn't gotten down to that paragraph. It indicates that: "We checked closely in connection with the attendance of both Dr. Rosenfeld and Dr. Lisner on Mr. Lutz, and secured a copy from the Equitable files as per form enclosed, herewith. It seems that this comes from Dr. Rosenfeld alone inasmuch as both doctors are in the same office, and the statement, herewith, is the one used by the [97] Equitable, or rather accepted by them, and terse and short as it is, any further statement from Dr. Lisner would, we understand, be a duplicate of the enclosed."

And I asked that after it served its purpose that it be returned to us for the Equitable files.

Mr. McGinley: Your Honor, I heretofore introduced in evidence as part of the cross examination of Dr. Rosenfield the enclosure that is referred to in the letter of December 8, 1942, just admitted for identification. I make that comment so that the record will be clear.

The Court: You might lodge it with the clerk right here, so there is sequence of this blown-up copy: just have it marked for identification, and on motion it can be substituted, so it will be more convenient for the District to have it before them.

(Deposition of Harold Morgan)

Mr. Herndon: I think the document referred to now is defendants' exhibit B for identification.

Mr. McGinley: That is correct.

Mr. McGinley: Mr. Anderson, there was handed to me by either Dr. Waste or by Mr. Leeds the form of questionnaire which I have just exhibited to you, and for the purpose of further interrogation of Mr. Morgan, to see whether or not this is a copy of the document that is referred to as an enclosure in the letter of December 8, 1942, to the Home Office, I would like to make use of this form subject to all of your objections. [98]

Mr. Anderson: Well, we have a photostatic copy of the original here. It might be better.

Mr. McGinley: You do have a photostatic copy?

Mr. Anderson: Yes.

Q. By Mr. McGinley: Mr. Morgan, directing your attention to the letter of December 8, 1942, do you have a photostatic copy of the form of questionnaire which was enclosed in that letter? A. Yes.

Mr. McGinley: Mr. Reporter, will you kindly mark for identification as Defendants' next exhibit the form of questionnaire which has been handed me by Mr. Morgan from his file.

(The document above referred to was marked by the reporter as Defendants' and Counter-claimant's Exhibit No. 2 for identification.)

Mr. McGinley: Your Honor, may I inquire, in view of the fact that we already have the questionnaire before us, that the matter, commencing line 26, page 18, to line 6, page 19, be deleted, and that on line 8, in referring to defendants' No. 2 for identification, we substituted defendants' B in this action.

(Deposition of Harold Morgan)

Mr. Herndon: So stipulated.

The Court: It will be received.

Q. By Mr. McGinley: Mr. Morgan, directing your attention to Defendants' No. 2 for identification, from whom [99] did you receive the original of which this document is a photostat? A. Stanley Leeds.

Q. And you received that approximately what date?

A. I imagine the same date that I wrote my letter of December 8th.

Q. I think you have already testified to it, but the original of this document was enclosed in your letter of December 8th?

A. That's my recollection, yes.

Q. Now, what next did you do, Mr. Morgan, in connection with the application of Mr. Lutz for insurance in the plaintiff company?

A. We received a letter addressed to Hays & Bradstreet dated December 4, 1942, from the Medical Department, in which the subject is Abe Lutz, No. 1174369, for additional. The letter recites: "We regret that we are unable to consider further without a complete detailed statement from Dr. Rosenfeld and Dr. Lisner. If they jointly attended the applicant and are fully acquainted with the facts, a statement from either may be satisfactory.

"We should like the full details."

And then the following questions:

"Why were the doctors consulted?

"What were the symptoms?

"What were the findings? [100]

"What treatment or advice was given?

"What were the results?

(Deposition of Harold Morgan)

"We are returning to you Dr. Rosenfeld's statement to the Equitable Life, as requested in your letter of December 8th."

Q. By Mr. McGinley: And the communication which you have just read is dated December 14, 1942?

A. That's right.

Q. From the Medical Department of the plaintiff company, and signed by H. M. Frost?

A. It isn't his personal signature. I don't know who it is, but there is an initial "M" directly beneath the name "H. M. Frost."

Q. Now, when you received the letter of December 14, 1942, did you communicate with Mr. Leeds?

Mr. McGinley: At this time, your Honor, as defendants' and counter-claimant's next exhibit in order, we offer in evidence plaintiff's letter dated December 14, 1942, from the New England Life Insurance Company to Hays & Bradstreet, signed H. M. Frost, Medical Director.

Mr. Herndon: Same objection as interposed to the previous offer.

The Court: This exhibit, and Exhibit B, will both be received in evidence, subject to a motion to strike, as explanatory of the testimony of this witness.

The Clerk: Exhibit K. [101]

A. Apparently I did. I see some memorandums in my handwriting on this letter, including a telephone number, which would seem to be Dr. Rosenfeld's telephone number, and I have written the name of a Miss Byington, and I have some memorandums opposite the questions that were recently read.

(Deposition of Harold Morgan)

Q. And the Miss Byington that you refer to, do you associate her name with the telephone number that is on the memorandum in your handwriting?

A. No, I don't. I frankly can't remember whether this information that I have down here came from her or from Mr. Leeds.

Q. Do you recall who you talked to at the office of Dr. Rosenfeld? A. No, I don't.

Q. Do you associate the telephone number Exposition 1369 as being Dr. Rosenfeld's telephone number?

A. I don't associate it, but it apparently is. It could be verified by the telephone directory.

Q. What is your present recollection as to the conversation that you had with Dr. Rosenfeld's office?

A. I have no recollection of that conversation. As I mentioned before, using the telephone as much as I do, it is impossible to remember specific conversations, and I frankly don't know whether the information that I have indicated is from Dr. Rosenfeld's office or whether it is from Mr. Leeds. [102]

Q. Taking the questions in the order in which you have read from the letter dated December 14, 1942, will you read into the record the information that you obtained in response to those questions?

A. The first question has a memorandum: "Because of requirements of Equitable for B.L.S.U.", which refers to blood sugar.

Q. Could I interrupt you there? That was in response to the question: "Why were the doctors consulted"? A. Yes.

Q. And then in response to the next question: "What were the symptoms"? A. The answer is "None."

(Deposition of Harold Morgan)

Q. And in response to the next question: "What were the findings"? A. The answer is "Neg."

Q. And in response to the question: "What treatment or advice was given"? A. "None."

Q. And in response to the question: "What were the results"? A. "Satisfactory."

Q. The last five responses that you have read in answer to my questions, they all appear in your handwriting, Mr. Morgan? A. Yes. [103]

Q. Is the telephone number "Exposition 1369" and the words "Miss Byington" in your handwriting?

A. Yes.

Q. And your recollection is that you received that information on approximately what date?

A. Well, obviously there is an error in the stamped date of the receipt of the letter at our office. Apparently it hadn't been fixed. But normally these letters come air mail and it takes a couple of days, so I would presume that that was about December 16, 1942.

Q. Then what next was done by you, Mr. Morgan, with reference to the application of Mr. Lutz for insurance in the plaintiff company?

A. In the meantime, I know there were a lot of conversations on the telephone with Mr. Leeds, but the next thing I have here is a copy of a letter dated December 24, 1942, addressed to the Chief Medical Director, Dr. Harold M. Frost of the New England Mutual Life Insurance Company, regarding Abe Lutz. Do you want me to read the letter?

Q. I wonder if you would. It is short.

A. "Dear Mr. Frost:

(Deposition of Harold Morgan)

"Referring to your letter of December 14th in connection with the additional insurance, I would like to give you the story on the case, and it looks very much as if we shall be unsuccessful at this time in securing a statement from the doctor. [104]

"Application was originally made to the Equitable who already had \$33,000 of insurance on this man, and they issued \$10,000 for a total of \$43,000. Additional insurance was wanted, and we issued on our original application \$13,000, which has been delivered and paid for. The additional \$13,000 was ordered without the request of Mr. Lutz, as the Agent hopes to deliver.

"When application was originally made to the Equitable, they asked for a blood sugar test by their Chief Director here, Dr. Waste, but before doing so, Mr. Lutz went to his own doctor, Dr. Rosenfeld, for this test to see if he were alright. He never would have gone if the Equitable hadn't wanted this information. There were no symptoms, the findings were negative, no treatment or advice was given, and the results were satisfactory. He then went to Dr. Waste, and submitted himself to their requirements.

"Under the circumstances, it would be deeply appreciated if our requirements can be waived. We attempted to have the Equitable send you their findings, but for some reason or other the local office advised that this could not be done."

That completes the letter.

Q. That is the letter dated December 24, 1942?

A. Right.

(Deposition of Harold Morgan)

Q. Now, in the letter which you have just read, referring to the paragraph which states as follows: [105]

"Application was originally made to the Equitable who already had \$33,000 of insurance on this man, and they issued \$10,000 for a total of \$43,000. Additional insurance was wanted, and we issued on our original application \$13,000, which has been delivered and paid for."

Now, with reference to the original issuance of \$13,000, does that refresh your memory as to when the original policy was delivered to Mr. Lutz?

A. Well, I wouldn't have any idea when it was delivered to Mr. Lutz, because my dealings were all with Mr. Leeds.

Mr. McGinley: At this time, as defendants' and counter-claimant's exhibit next in order, we offer in evidence a letter dated December 24, 1942, from Harold P. Morgan to Doctor Harold M. Frost, chief medical director of the plaintiff company.

Mr. Herndon: Same objection.

The Court: Same ruling. In evidence subject to a motion to strike.

The Clerk: This is L.

Mr. Herndon: I understood the previous ones your Honor had marked for identification. This present one is already in evidence.

The Court: Very well; let it be marked for identification with the understanding, if it is already in evidence it will be subject to a motion to strike. [106]

Q. Is there anything in your file in the way of memorandum or from your Home Office or personal notations that would show what you did in connection with

(Deposition of Harold Morgan)

the original application, if anything, for the \$13,000 insurance referred to in that paragraph?

A. I have no specific recollection, but it undoubtedly would be handled in a routine manner; after it would go through our record, the policy would be handed to me for delivery to Mr. Leeds, the agent.

Q. You have with you the interchange of correspondence with your home office relative to the issuance of the original policy for \$13,000?

A. Well, we have quoted from it. It is here. I think the letter that has been read into the record of November 16th and the letter of November 17th.

Q. Well, directing your attention, then, to the letters of November 16th and November 17th, is there anything in their contents which would enable you to refresh your memory as to what you did in connection with the original application for \$13,000?

Mr. Anderson: I think that was covered in a previous question, if I remember.

The Witness: What I did with the original application? I think I answered that that the application was transmitted to Boston, our Home office.

Q. By Mr. McGinley: With reference to the original [107] application for \$13,000, did you forward to the Home Office the original of defendants' for identification No. 2?

Mr. McGinley: Off the record.

(Discussion outside the record.)

Mr. McGinley: Mr. Reporter, I am handing you as Defendants' next exhibit for identification, a photostatic copy of the policy furnished me by plaintiff's counsel.

Mr. McGinley: May I inquire if counsel is willing to stipulate as to the policy which was handed to the witness

(Deposition of Harold Morgan)

at this time, in the deposition, was the policy which is in suit in this case?

Mr. Herndon: Yes, so stipulated.

The Court: It will be received.

Q. By Mr. McGinley: Mr. Morgan, to clarify the policies that are referred to in the correspondence concerning which you have given testimony, I am handing you a photostatic copy of a policy issued by the plaintiff company on the life of Abe Lutz, which bears the date of issue October 13, 1942, and is assigned policy number 1,172,844, and ask you this question: Is this the policy that is referred to in the last letter, dated December 24, 1942?

A. The letter of December 24, 1942, refers in the second paragraph to original policy of \$13,000, which bears policy No. 1,172,844.

Q. And is this the policy, Defendants' Exhibit 3 for identification, that is referred to in the second paragraph [108] of the letter dated December 24, 1942?

A. Yes.

Q. All right, then, continuing with the letter of December 24, 1942, what next was done by you, Mr. Morgan, in connection with the application for insurance by Abe Lutz in the plaintiff company?

A. Well, I waited to get a response to that letter of December 24, 1942.

Q. And did you receive a response?

A. Yes. It was in the nature of a telegram dated December 29, 1942.

Q. From the Home Office?

A. From the Home Office, and addressed to New England Mutual Life Insurance Company, 609 South Grand Avenue: "Abe Lutz regret that there is no

(Deposition of Harold Morgan)

change in our requirements." Signed "New England Mutual Life Insurance Company."

Q. And what did you next do?

A. Apparently that information was transmitted to Mr. Leeds.

Q. About December 29, 1942?

A. I imagine so.

Mr. McGinley: As defendants' and counter-claimant's exhibit next in order we offer telegram addressed to New England Mutual Life Insurance Company, 609 South Grand Avenue, Los Angeles, California, from New England Mutual Life Insurance Company. [109]

Mr. Herndon: Same objection.

The Court: Same ruling. Let it be marked for identification.

The Clerk: Defendants' Exhibit M.

Q. And then what next did you do?

A. The next thing I find is a letter dated January 14, 1943, addressed to Hays & Bradstreet, from the Medical Department, subject: Abe Lutz, Policy 1174369, and the letter reads: "We regret to advise that we are today removing this case from our pending file. We feel that sufficient time has now elapsed since our request for an attending physician's statement. We are, therefore, marking the application as incomplete and placing it in our closed file. Yours very truly, F. R. Brown, Associate Medical Director."

Q. That is dated January 14, 1943?

A. Yes, and it was apparently received by us on January 18, 1943.

(Deposition of Harold Morgan)

Q. And following the receipt of the letter of January 14, 1943, did you communicate its contents to Mr. Leeds?

A. I most likely did. I have no definite recollection of a specific telephone call.

Mr. McGinley: If your Honor please, the defendants and counter-claimant offer as the next exhibit in order, in evidence, letter dated January 14, 1943, from New England [110] Mutual Life Insurance Company, from F. R. Brown, Associate Medical Director.

Mr. Herndon: Same objection.

The Court: Same ruling. Mark it for identification.

Q. Now, was your conversation communicating what in substance was a rejection of this additional application for \$13,000 life insurance for Abe Lutz in the plaintiff company the last episode in connection with this matter?

A. As far as I know, yes.

Q. Now, I note, Mr. Morgan, referring to the letter dated January 14, 1943, that the policy concerning which that advice was given, to-wit, in substance their rejection, refers to policy No. 1174369. That is correct, isn't it?

A. Yes. That's the original policy.

Q. Yes. Now, the policy, Defendants' Exhibit 3 for identification, that had been previously issued, bore policy No. 1172844; is that correct? A. Yes.

Q. So that the interchange of correspondence commencing with the date—strike that question.

To which policy does the letter dated November 16, 1942, refer? Policy No. 1172844 or Policy No. 1174369?

A. The first numbered policy.

Q. And to which policy does the letter dated November 17th refer? [111]

Mr. Anderson: You are asking the question on the basis of the reference made in the letter to a policy num-

(Deposition of Harold Morgan)

ber, not as to whether they are talking about this policy or the other policy?

Mr. McGinley: I am asking Mr. Morgan to which policy the correspondence refers, where they don't identify it by number, because it is apparent now, Mr. Anderson, that there was an original policy number 1172844 issued and dated in accordance with an arrangement with the insured, October 13, 1942, and then an additional application for \$13,000 was made and that was rejected.

Mr. Anderson: Well, my only point is that there having been no second policy numbered at the time that correspondence was going on, the only reference they could make would be to the original policy.

The Witness: There had not been any policy number assigned on November 17, 1942; there had not been time because the application was only submitted on that date.

Q. By Mr. McGinley: On November 16th?

A. November 16th and November 17th—no. November 17th. "I am now pleased to enclose an application."

Mr. McGinley: Off the record.

(Discussion outside the record.)

Q. By Mr. McGinley: Now, let me ask you this: Confining your answers to questions directed solely to Policy No. 1172844, date of issue October 13, 1942, what [112] documents were forwarded by you, Mr. Morgan, to plaintiff company prior to the issuance of that policy?

A. An application for the policy.

Q. And that you have testified as being the original of Defendants' Exhibit 1 for identification?

A. Right.

(Deposition of Harold Morgan)

Q. Now, in addition to the application, Defendants' Exhibit 1 for identification, did you also forward to plaintiff company prior to the issuance of Policy No. 1172844 the original of Defendants' 2 for identification?

Mr. Anderson: Having in mind the policy was issued December 1st.

The Witness: No. That Defendants' Exhibit 2 was apparently forwarded after the original policy had been received. The letter of transmittal indicates it was forwarded on December 8th.

Q. By Mr. McGinley: Then using those two dates as a guide post, December 1, 1942, and December 8, 1942, when was policy No. 1172844 issued, if you know, by plaintiff company?

A. I don't know the exact date. It would have been between those dates. I presume, from the telegram and the letter dated December 1, 1942, that that was the date the policy was actually issued in Boston.

Q. What would be the date, again?

A. December 1, 1942. [113]

Q. The policy, No. 1172844, was forwarded by the plaintiff company to you in Los Angeles for delivery to Mr. Leeds, was it not? A. That's right.

Q. And you did deliver it to Mr. Leeds?

A. Yes.

Q. Is there anything in your file or independent of the file that fixes the date that you delivered the policy to Mr. Leeds?

A. There may be a date on our office ledger card, which is a permanent record, and for bookkeeping purposes kept, of course, in our office.

(Deposition of Harold Morgan)

Q. From your testimony here, Mr. Morgan,—and I merely ask this in the interest of completeness—is it your statement that Policy No. 1172844 was issued by plaintiff company and delivered by you to Mr. Leeds before you contacted Dr. Rosenfeld's office?

Mr. Herndon: We object to this question (page 31, line 25, to page 32, line 3), your Honor, on the ground that it is assuming facts not in evidence, in that the witness did not testify that he called Doctor Rosenfeld's office, but did not remember whether he called Doctor Rosenfeld's office or not, or whether he got the information which he noted in his notations on the exhibit, from Mr. Leeds.

The Court: I think that is true; let us have that statement without prejudice, inasmuch as the man is not here.
[114] Read that question again.

(Mr. McGinley reading.)

From your testimony here, Mr. Morgan—and I merely ask this in the interest of completeness—it is your statement that Policy No. 1172844 was issued by plaintiff company and delivered by you to Mr. Leeds before you contacted Doctor Rosenfeld's office?

The Court: Suppose you change that question and say "before the circumstances about which you have testified in connection with the possible contact with Doctor Rosenfeld's office"?

Mr. McGinley: I will ask that the question then be amended by the Court's language, your Honor.

The Court: Very well. Now, you may read the answer.

A. Yes, because the letter you refer to is dated December 14, 1942, and my recollection is that the entry went

(Deposition of Harold Morgan)

through our bookkeeping department on December 9, 1942, indicating that we received payment of the premium on this policy, 1172844, approximately that date; that is, December 9, 1942.

Q. To your knowledge what information did the plaintiff company have with reference to the health and physical condition of Abe Lutz, prior to the time that it issued Policy No. 1172844?

Mr. Anderson: He is not qualified to answer that [115] question.

Mr. McGinley: Well, limit it to his knowledge. I know he doesn't know what the medical director did.

The Witness: Only the copy of the examination from Dr. Waste.

Q. By Mr. McGinley: And that is Defendants' Exhibit 1 for identification? A. Right.

Q. And the obtaining of defendants' Exhibit 2 for identification was in connection with a consideration of the additional application for insurance, which was rejected? A. Right.

Q. Prior to the issuance of the original policy, No. 1172844, did you contact Dr. Waste with reference to obtaining a report on the health and physical condition of Abe Lutz?

A. I have no recollection of so doing, no.

Q. In connection with the additional application, which was assigned policy number 1174369, did you act or communicate with Dr. Waste relative to the health and physical condition of Mr. Lutz?

A. Not to my recollection, no.

Q. Your inquiry relative to the health and physical condition of Abe Lutz was confined to the conversation

(Deposition of Harold Morgan)

as borne out by your personal memorandum on the letter dated December 14, 1942? [116] A. Yes.

Q. Now, the card index or office records that you referred to in answer to one of my questions concerning the issuance of Policy No. 1172844 would show the date of the payment of the premium?

A. It would show the date that it went through our books.

Q. I understand from your testimony that that date would coincide with the date of the delivery of the policy to Mr. Leeds? A. Yes.

Mr. Anderson: You mean coincide or be approximate?

Mr. McGinley: Approximately.

Q. Now, when—refresh your memory from any of your memorandum, Mr. Morgan—for the first time was the matter of an additional policy for \$13,000 brought up?

A. It is referred to first in my letter of November 17, 1942.

Q. Would that refresh your memory that in your original conversation with Mr. Leeds he mentioned one policy for \$13,000, and if that was issued he wanted an additional policy for \$13,000?

A. I don't know. The original letter of November 16, 1942, only mentioned the case, and there was no specific mention of any amount in the letter of November 16, 1942.

Q. What is your independent recollection as to when [117] the conversation concerning the additional \$13,000 policy occurred?

A. I have no recollection, no definite recollection of it. The letter would indicate that it was November 17, 1942.

(Deposition of Harold Morgan)

Q. Mr. Morgan, during your ten years of experience in the insurance business in the manner in which you have testified, are you familiar with the custom and usage of insurance companies in the City of Los Angeles, relative to investigating the health and physical condition of an applicant for insurance, prior to the issuance of the policy?

Mr. Herndon: If the Court please, plaintiff objects to that question (page 34, lines 18 to 23), upon the ground that no proper foundation has been laid to qualify the witness to testify as an expert on the subject matter inquired about.

The Court: Of course, this is the statement by counsel as to whether or not he is qualified. I presume if he said yes, he is subject to voir dire to determine what is the background in the answer.

A. Well, there is a certain routine procedure followed—

Mr. Anderson: Well, I don't believe that he is qualified to make any statement on that subject, to have a binding effect on any company here.

Mr. McGinley: Can we do this, Leo, make your objection [118] and allow him to answer? I am just about through.

Mr. Anderson: Well, as far as I am concerned, I would ask Mr. Morgan not to answer it, because I don't think it would have any bearing on this case, or should even be thrown into it by deposition or otherwise.

Mr. McGinley: Well, then, you are instructing him not to answer the question?

Mr. Anderson: I am asking him not to. He is not my witness.

(Deposition of Harold Morgan)

Q. By Mr. McGinley: All right, will you answer the question, Mr. Morgan? As I understood you, you started to say there was a certain routine that you are familiar with; is that correct?

A. Well, it is automatic that we request a retail credit inspection on an application that is submitted to the company.

Q. And that retail credit inspection, I assume, is confined to the financial stability of the applicant; is that right? A. We don't see those reports—

Mr. Anderson: Same objection.

Q. By Mr. McGinley: Other than the obtaining of a financial or credit report on the applicant or the beneficiary, is it not a fact, Mr. Morgan, that there was in effect in Los Angeles, during the year 1942 a custom and usage among insurance companies to contact or communicate with [119] physicians or surgeons who had been listed by an applicant on the formal application, to determine directly from such physicians or surgeons the health, physical condition and treatments given to any applicant who applies for insurance?

Mr. Anderson: Same objection to that on all the grounds that we have set forth in the record here, which I understand have been reserved to all these questions.

Mr. McGinley: That is satisfactory.

Mr. Anderson: And on the further ground that I know from past experience that is not the custom.

Mr. McGinley: Well, you know more about the insurance business than I do, and I am asking an expert here what is your testimony, Mr. Morgan?

Mr. Anderson: He is not qualified as an expert. That's the reason I am making the objection.

(Deposition of Harold Morgan)

Mr. McGinley: Well, if your objection is good, Leo, it is as good on the date of the trial as it is now, and it is to save us from going up there—

Mr. Anderson: I don't see any percentage, John, in going into a lot of stuff in this deposition that has nothing to do with the case. That is why I am asking Mr. Morgan to refuse to answer.

Mr. McGinley: You understand my theory; I think it is admissible, Leo. But you and I are not going to decide any questions of law here.

Mr. Anderson: Submit it to the Court, if you want [120] to go into that, and get a ruling on it.

Mr. McGinley: All right. Let's have the record clear, then.

Mr. Reporter, will you ask the last question of Mr. Morgan so that we can have the record clear?

(The question was read by the reporter.)

The Witness: I refuse to answer that question.

Q. By Mr. McGinley: And your refusal to answer is on the advice of counsel?

A. I am not qualified to answer the question.

Q. When you say you are not qualified, you mean by that that you do not know whether such a custom exists, or that you feel your experience is such that you are not competent to answer it?

A. I feel that I am not competent to recite procedure on the part of insurance companies.

Q. So that I might be informed, Mr. Morgan, in connection with the original Lutz application, without my mentioning the policy number, from whom do you receive compensation for such services as you rendered in that regard? A. Hays & Bradstreet.

(Deposition of Harold Morgan)

Q. And, if you know, for the services that you rendered in connection with the first application, does the plaintiff company pay Hays & Bradstreet any compensation?

A. They may pay them compensation, but I don't know the answer to that question. [121]

Q. Did you receive any compensation for the services you rendered in connection with the original Lutz application from Mr. Leeds?

A. Did I receive any compensation from Mr. Leeds?

Q. Yes. A. No, I did not.

Q. The compensation that you received was from Hays & Bradstreet? A. That's right.

Q. And you do not know whether or not plaintiff company paid Hays & Bradstreet any part of the premium paid by Mr. Lutz for the services that you rendered in connection with the original policy?

A. I don't know what their basis of compensation is.

Q. Well, from your experience, such as you have recited, in the insurance business, do you receive compensation for your services from the insured or the insurance company? A. From the general agent.

Q. And does the general agent receive compensation for the services that it renders from the insured or the insurance company?

Mr. Anderson: He just answered that. He said he didn't know.

Mr. McGinley: Well, I think he does know. I mean if he wants to say he doesn't know, it is all right. [122]

The Witness: They can't operate without some kind of compensation, but I said that I don't know the basis of the compensation. They must receive compensation from the insurance company to operate an office.

(Deposition of Harold Morgan)

Q. By Mr. McGinley: And you don't recall the percentage of compensation?

A. I am not in the firm, you see. I don't know the basis of compensation.

Q. You are employed on a salary, Mr. Morgan?

A. I am on a salary, yes.

Q. And you are not a partner?

A. I participate in profits, but I am not a partner.

Q. I see.

Mr. McGinley: Let the record show the following interchange of correspondence and wires may be grouped together as one exhibit for identification, being Defendants' next in order: A letter dated November 16, 1942, from Hays & Bradstreet to Mr. Doane Arnold; a letter dated November 17, 1942, from Hays & Bradstreet to Doane Arnold; a telegram dated December 1, to New England Mutual Life Insurance Company, 609 South Grand Avenue; a letter dated December 1, 1942, to Hays & Bradstreet from New England Mutual Life Insurance Company; a letter dated December 8, 1942, to Mr. Doane Arnold from Mr. Morgan; a letter dated December 14, 1942, to Hays & Bradstreet from New England Mutual Life; a letter dated December 24, 1942, from Hays & [123] Bradstreet to plaintiff, to New England Mutual Life; a telegram dated December 29, 1942, to New England Mutual Life, 609 South Grand Avenue; and a letter dated January 14, 1943, to Hayes & Bradstreet, from New England Mutual Life.

(The documents above referred to were marked by the reporter as defendants' and counter-claimant's Exhibit No. 4 for identification.)

(Deposition of Harold Morgan)

Q. By Mr. McGinley: Mr. Morgan, during the year 1942, especially during the months of November and December, 1942, you were supplied, were you not, with a form of questionnaire by plaintiff company similar in form and contents to that which has been identified here as Defendants' Exhibit 2 for identification?

Mr. McGinley: May I inquire if counsel is willing to stipulate that the reference to defendants' exhibit 2 in question is in reference to defendants' exhibit B in evidence?

Mr. Herndon: Yes, I so stipulate.

The Court: Very well.

A. Well, the correspondence would indicate that Exhibit 2 is a photostatic copy of the original form which I had sent in to our Home Office.

Q. Yes, but Exhibit 2 is the form of questionnaire used by another insurance company, the Equitable Life Insurance Company. My question is directed to the fact that the New England Mutual Life Insurance Company, during the year 1942 and especially during the months of November and [124] December, 1942, had their own form of questionnaire, similar in substance and form to the one you now have in your hand?

A. Well, we use a form, but if you are asking a specific question whether or not we had a form on this case, I don't remember one.

Q. Do you have with you the form of questionnaire that is used and was used by the New England Mutual Life during the months of November and December, 1942?

A. I don't happen to have one with me, no.

(Deposition of Harold Morgan)

Q. You do have a supply in your office, do you not?

A. In our office, yes.

Mr. McGinley: May it be stipulated, Mr. Anderson, subject to all of your objections, that when the deposition is written up there be attached thereto and marked as Defendants' next exhibit for identification the form of questionnaire used by the New England Mutual Life Insurance Company?

Mr. Anderson: No. That will be settled Monday.

Mr. McGinley: That is probably right. May I make this suggestion, so that we won't have to continue this deposition to have Mr. Morgan come back solely for that one reason, that if the Court rules favorably on my contention on Monday, that the form of questionnaire be attached to the deposition when it is signed by Mr Morgan?

Mr. Anderson: I don't know what they may have in the way of forms over there. I don't know that what they [125] have there would be what they had in 1942. In other words, if the Court orders that we let you have a copy of any form, we will secure the form and furnish it to you, and it won't have anything to do with this deposition.

Mr. McGinley: Well, that is satisfactory. If the ruling is favorable Monday to my contention that it is competent and material, without the necessity of calling Mr Morgan, you will sent me over a photostatic copy or a copy of the form of questionnaire that was used by the New England Mutual Life during the months of November and December, 1942.

(Deposition of Harold Morgan)

Mr. Anderson: We will comply with whatever the Court orders.

Mr. McGinley: All right. Now, there is only one thing left, and that is the refusal of the witness to answer the question as to the usage and custom.

Mr. Anderson: He finally answered it. He said he didn't know.

Mr. McGinley: I think it went deeper than that. I think he said that he wasn't competent. Of course, that is his opinion and conclusion.

Mr. McGinley: At this time, your Honor, as defendants' and counter-claimant's exhibit next in order, we offer in evidence a copy of the attending physician's statement of the New England Mutual Life Insurance Company. It is a blank form.

Mr. Herndon: Plaintiff objects to the offer on the [126] ground that it is incompetent, irrelevant and immaterial in that it is a blank form, and contains nothing, and therefore has no tendency to prove any fact in issue in this case.

Mr. McGinley: My purpose in offering that, your Honor, is on this theory: One of the defenses to this suit is bottomed on waiver, and, additionally, on estoppel. Now, estoppel and waiver, or the evidence which will make out estoppel and waiver, depends in this case on matters that were not done, as well as matters that were done. One of items of proof which go to a showing that the plaintiff, insurance company, failed to do that which the law required him to do, was to contact Doctor Rosenfeld when the name was listed on the application. Under the authorities the ease with which information, later claimed to be material, may be obtained is an item of

(Deposition of Harold Morgan)

proof, and this blank form is offered to show that at the critical time in question, plaintiff company at its home office in Los Angeles, was furnished with the name of the doctor, the telephone number, and it could have obtained in that form evidence or information that has been introduced here through Doctor Rosenfeld, which is now asserted to have been withheld from it before the policy was issued.

The Court: I think possibly your objection is largely to the weight to be given to it. Certainly it is a matter of common knowledge that insurance companies have forms for such a contingency, and certainly that would not be denied by [127] plaintiff's counsel. I think that is about all that this can possibly prove, and I think undoubtedly counsel will stipulate that the New England Mutual undoubtedly had forms to take the statements of attending physicians, if they wanted them, and that those were available to anyone who needed them in the City of Los Angeles. Do you so stipulate?

Mr. Herndon: Yes, your Honor.

Mr. McGinley: I accept the stipulation.

The Court: I don't think this is of any particular value to us. It can be marked for identification. Let it go at that.

The Clerk: Defendants' Exhibit O.

Mr. McGinley: Reserving the right to have that question answered, that's all the questions I have.

Mr. Anderson: I have no questions.

(Deposition of Harold Morgan)

Mr. McGinley: Let the record show, then, that with the exception of having and reserving the right to have the witness answer as to the custom and usage, in the respect which I mentioned, that we have no further questions at this time. And after I read the deposition, I may want to have Mr. Morgan cited to answer that question. Don't close the deposition.

Mr. McGinley: That concludes, your Honor, the reading of the deposition under the circumstances which we have indicated. [128]

The Court: I am taking the liberty, under the extraordinary circumstances, to make some slight modifications in questions in order to make them available. I think there were only two or three of those, and as I understand it, the modifications were satisfactory in order that whatever there was in the answer of materiality could be received.

Mr. Herndon: Yes.

The Court: May it be so stipulated?

Mr. McGinley: So stipulated.

(Short recess.)

Mr. Herndon: If your Honor please, with reference to the testimony of Mr. Morgan, which has just been read, may it be understood, in view of the fact that it was taken subject to our objections, and motions to strike, that the motions to strike may be made at the conclusion of the case?

The Court: Yes.

[Endorsed]: Filed Oct. 31, 1945. [129]

[Title of District Court and Cause.]

Honorable Ralph E. Jenney, Judge Presiding

TRANSCRIPT OF COURT'S OPINION

May 4, 1945

Los Angeles, California

Appearances:

For the Plaintiff: McLaughlin & McGinley, by John P. McGinley, Esq., and W. L. Baugh, Esq.

For the Defendants: Meserve, Mumper & Hughes, by Roy L. Herndon, Esq., and Leo P. Anderson, Esq.

Los Angeles, California, Friday, May 4, 1945,
10:00 o'clock

The Court: We will take up the matter of New England Mutual Life Insurance Company v. Lutz, with particular reference to the plaintiff's and defendants' motions to strike from the evidence. I shall take up, first the defendants' and I will take them right on down so that it will be easier for you to keep track of them as they appear in the motions to strike the testimony and evidence, filed on April 3, 1945, at 3:19 p. m.

The first motions are directed to the evidence of H. Ludden, or Luden, whom, you will remember, was the pharmacist who appeared and testified as to certain facts connected with the filling of prescriptions for Abe Lutz and as to certain conversations which were had between the pharmacist and the decedent at the time that the prescriptions were filled. The testimony of the witness Ludden, as I understand it, was admitted only for the purpose, and for the limited purpose, of showing knowledge on the part of the deceased and that that was so understood at the time the evidence was admitted. It

seems to the court that this evidence is clearly admissible as declarations against interest binding upon the defendant; also, because of his privity with the insured and as a party to the contract. They are oral statements of pain and suffering which go to show the insured's familiarity with and knowledge of his [2] physical ailments.

We have here, also, a rather unusual situation as revealed by the evidence. The son of the insured, the defendant Harry Lutz, apparently arranged for the insurance. It was gotten up by a man who lived next door to him and he was thoroughly familiar with the details of it and, as I understand it, he paid for it also and he was made the beneficiary.

The motions in connection with the testimony of Ludden, 1 to 29, both inclusive, including the direct and cross and redirect, are all denied.

30 is, likewise, denied. In addition to the other observations, this motion is too general and sweeping in scope to be of any value.

As to the testimony of Martha Tucker, which comes next in order, it is the court's understanding as to this testimony that it was introduced for the sole purpose of laying a foundation for the introduction of plaintiff's Exhibit 8, which consists of certain records of the Cedars of Lebanon Hospital concerning the decedent Abe Lutz, and at the time that it was offered it was indicated by counsel that it was so limited. These records were attempted to be introduced by plaintiff under the so-called "shop book rule." There is some confusion in the decisions with respect to the admissibility of hospital records under this "shop book rule." This uncertainty, I think, was somewhat exaggerated after the de- [3] cision of the United States Supreme Court in the case of Palmer

v. Hoffman, 318 U. S. 109. The latest case on the subject apparently was decided by the United States Court of Appeals for the District of Columbia on May 8, 1944, New York Life Insurance Co. v. Taylor, originally in 143 F. (2d) 14. The written decision was withdrawn from the bound volume and the opinion on the re-hearing appears in 147 F. (2d) 297, at which point appear both the original opinion and the opinion on the re-hearing. Whether or not this court is in accord with the majority opinion in that case is beside the point. We have here a somewhat different situation. The evidence of value to the court in these records of the Cedars of Lebanon Hospital is largely cumulative, the facts having been testified to by Dr. Rosenfeld et alia. Under the circumstances, we feel disposed to strike all the testimony of Martha Tucker, all the testimony of Lillian Duncan, Exhibit No. 8, which was the records of the Cedars of Lebanon Hospital concerning Abe Lutz, the insured, Exhibit No. 23, which was the evidence of certain clinical records of the Sansum Clinic concerning said Abe Lutz, the deposition of Freeman P. Spinney, Exhibit No. 24, and the deposition of Dr. H. M. Benning, Exhibit No. 25. The last two mentioned exhibits were offered, as we understand it, for the sole purpose of laying the foundation for the admission of Exhibit No. 23. We are frank to say that we are in ac- [4] cord with the decision in the New York Life Insurance Co. v. Taylor case to the extent that it declines to receive diagnoses, which, under the circumstances, seems to me to be dangerous. They may be speculative; they may be self-serving; they may be a good many things which would make the receipt of such testimony dangerous and the court should require a better type of evidence. We believe that, under the circumstances here indicated, the history revealed by the

insured might well be considered admissible under the heading of "knowledge" and declarations against interest. If all of the other foundations are properly laid and the testimony in the background is properly before the court, it is a little bit difficult to see why the record, properly kept in accordance with the rules, and the statement made by the decedent indicating familiarity with and knowledge of his physical condition, should not be admitted. I am a little bit sorry that these decisions haven't been a little bit more clear-cut along that line. Inasmuch, however, as the evidence is merely cumulative, and inasmuch as there is some apparent confusion in the decisions, the court has decided to exclude it. There being no jury present, we feel that the court should be permitted to select the evidence upon which it will rely.

As to the testimony of Henry H. Lissner, this testimony was apparently offered only for the purpose of further iden- [5]tifying Exhibit No. 8 and for the purpose of showing the authorship of certain entries which were otherwise proved. The testimony is, therefore, stricken and the motion granted in that regard.

As to the testimony of Maurice H. Rosenfeld, the court feels that, generally speaking, the testimony of this witness was properly received in evidence. This testimony is objected to on the ground of privilege and on the further ground, generally speaking, that it is hearsay. The testimony limits the information obtained by Dr. Rosenfeld from the deceased to that period of time prior to November 16, 1942. It is, likewise, the court's view that privilege has been waived.

However, the answers to certain specific questions should be stricken. Motion No. 1 as to page 47, lines 13 to 15, and at line 17, should be and is granted.

Motions 3 to 98, both inclusive, in connection with that testimony, are denied.

It will be noted that the testimony indicated under objections 17 and 18, 30 and 31, were all, like similar questions, revealed to the patient, and the doctor testified in effect as to what he told the patient. I think there is sufficient background to indicate that as a proper finding.

The electrocardiograms, Exhibits 12, 13, 14, 15, 16, 17, and 18, are admitted only for the purpose of explaining [6] the testimony of Dr. Rosenfeld. It is our understanding that each of these electrocardiogram exhibits was made under the orders of Dr. Rosenfeld and in connection with his examination. In connection with objections 17 and 18 as to the report of the eye specialist, Dr. Stephen Seech, it will be noted that Dr. Rosenfeld testified as to what he told the decedent about this report of Dr. Seech, and it is limited in its admissibility in that manner.

The motion to strike No. 99 is too general in nature to be of value and is, therefore, denied.

As to the testimony of Paul M. Arnold, the court feels that the waiver of decedent contained in the application predicated upon which the policy was issued is an effective waiver as against the defendant, Harry Lutz, upon the ground of privilege. The court further believes that Exhibit No. 20 is admissible for the purpose, in connection with other evidence, of proving that the defendant, Harry Lutz, had waived the privilege and was estopped to assert the objection of privilege. Therefore, the motion of defendant as to plaintiff's Exhibit No. 20 is denied.

As to the testimony of Freeman P. Spinney, being in the form of a deposition, this testimony was introduced, as we understand it, for the sole purpose of laying the

foundation for the introduction of the hospital records of Sansum Clinic. On account of the views heretofore expressed in connection [7] with that matter, the deposition is stricken and motions 1 and 2 of defendant, under the heading of "Spinney," are granted.

On the testimony of Stephen G. Seech, it will be noted that the testimony of the witness Dr. Seech relates to occurrences prior to November 16, 1942. We believe that any proper objection is to the weight to be given to this testimony and not to its admissibility, and what weight the court will give it is a matter for consideration by the court. While the statement of Dr. Seech is not too specific, the court believes that Dr. Seech testified that he told substantially everything about which he testified, to the decedent, that is, the material parts of his findings as indicated in Volume 2, page 41, line 18, of the testimony. With that limited understanding, it will be received.

Motions 1 to 15 to strike, under the heading of "Seech," are denied. No. 15 is denied as being too general.

As to the testimony of Preston B. Brown, the motions to strike under this heading are all denied. While we believe, as heretofore indicated, that the deceased and defendant, Harry Lutz, both waived the privilege, we believe that this evidence is admissible for the limited purpose of showing the attitude of defendant in connection with this question of privilege and for that purpose only. They are so limited. [8]

As to the testimony of Lillian Duncan, the motions directed against this testimony are all granted because of our previous view as to the records of Cedars of Lebanon Hospital.

As to the testimony of H. M. Benning, on account of our view as to the admissibility of the hospital records,

the testimony of H. M. Benning in connection therewith is stricken.

Plaintiff's Exhibit No. 21 is, likewise, stricken, as are also Exhibits Nos. 22 and 23.

As to the deposition of Dr. Harold M. Frost, Interrogatory No. 31 was objected to during the trial and it now is the subject of a motion to strike. The motion is denied.

The motions as to Interrogatories Nos. 32 to 37, both inclusive, are each denied.

The motion to strike the answer to Interrogatory No. 45 is denied as it is indicated in the answer to Interrogatory No. 12 that the New England Mutual Life Insurance Company of Boston followed the general practice.

The motion to strike the answer to Interrogatory No. 46 is denied.

Objection No. 9 to the testimony of Dr. Frost is denied as being too general.

As to the testimony of John M. Waste, the motions in connection with this testimony are denied. [9]

As to the objections or motions to strike of the plaintiff, here, again, we have a rather unique situation. The federal rules, in effect, provide that, if evidence is admissible for any purpose, it should be received so that the record may be complete before the Circuit Court of Appeals or any other court that may have an interest in it or may be complete before the trial court.

Just speaking informally, we have this situation. The defendant pleads, what we might describe as, certain affirmative defenses. The plaintiff, to insist upon its rights, pleads estoppel. The defendant has rather a hard job on his hands. That is always true. The attorney for the defendant wants to protect his client's interests. He does not know just how far he is going

to be able to get but he is professionally and morally obligated and certainly he desires to do everything he can to protect his client's interests and find out what there is there. He may have to go on somewhat of a fishing expedition but, after all, quite frequently he gets a lot of information that is of value and he has to do so. Sometimes it is of great benefit to him and sometimes it doesn't do him any good. It is just innocuous, as sometimes it helps the other fellow. That is the chance a lawyer and a defendant always have to take.

Here the court is asked to permit the evidence to go in and it is objected to on the ground that it is immaterial. [10] How is the court going to know whether it is going to be material or is not going to be material? It can't tell at the time. He lets it go in and then it is subject to a motion to strike and the court is charged with the responsibility of meeting those issues.

Let's just pick out an item to illustrate what I mean. The contention of defendant, stripped of all of its technicalities and all of its verbiage in one regard, is that the decedent, the insured, was Yiddish, was Jewish, read Hebrew but didn't read English well, and that he signed something he didn't understand and, therefore, in all good conscience, he should not be bound by it. The evidence perhaps discloses that here was a shrewd business man. He had accumulated a fortune of a half a million dollars. He had an income of approximately seventy-five to one hundred thousand dollars a year, indicating that he was a pretty shrewd, careful, intelligent, business man.

The evidence also showed, by lawyers who had served him, that he didn't read documents but he understood them when they were read to him, and he always had important documents read to him. The lawyers testified that, when they did anything for him, they read the

documents to him or that someone came in and read them to him and then he exercised his judgment predicated upon what he heard.

That is one phase of the matter. Maybe the testimony [11] doesn't establish a case for the defendant. Maybe it favors the plaintiff. But should I strike it?

Let's take the testimony as to this correspondence involved in these applications currently before the court and the testimony with regard to other insurance. The position of the defendant is that all of the information was before the plaintiff insurance company or, if it wasn't, it should have been; that it was their business to pry loose information because they were placed on guard by some of the answers in the applications. I am not attempting to speak too technically. I am just speaking generally. The position of the insurance company is, "Well, we were satisfied to take a chance for \$13,000 predicated upon knowledge we had. We were not bound to go out and do anything more. We were willing to take that chance and we had a right to rely upon what we were told. But, if we were going to take on any heavier load, we were going to have to have additional information." These are serious matters and they might affect different judges in different ways. Each judge certainly should be permitted to see what is behind all these charges or claims and then determine what weight he is going to give to them.

I think, also, that there is good sense and safety in the ultimate objective of all courts to do justice in letting evidence in where it seems admissible under any theory. [12]

The objections of plaintiff, that is, the motions to strike of plaintiff, as indicated in the written memorandum filed on April 3rd, entitled "Plaintiff's Motion to Strike Evi-

dence from the Record," Nos. 1, 2, 3, 4, 5, 6, and 7, are all denied.

Now, gentlemen, you are in a position to do any arguing that you want to and file any briefs that you want to. I don't believe that we need to take the time for any oral argument. That is my own view. I have followed this evidence with particular care. I have read these transcripts, the evidence, and am very familiar with them from the standpoint of an examination necessary to arrive at a conclusion on these motions to strike. I can't guarantee that I am right and you gentlemen, of course, can't guarantee I am wrong. All I can do is to do the best I can under the circumstances. Some other court will have to determine it. My view of the matter, after the most careful examination of all of the cases, is that the rules are correct. The law is not a hundred per cent clear. This is no case where there are decisions on all fours on many of these points. I have studied all of the decisions that have been cited in the briefs. I have read every one of them. And I will be very glad to have your written arguments or briefs, whatever you want to call them. I simply tell you that I am familiar with these decisions and I have studied them. So you don't [13] need to feel you will have to do a lot of quoting from the cases because I have an armful of these books right in front of me and I can refer to them.

I would like to get any written arguments that you want to file, very promptly, before I get too much enmeshed in the criminal calendar which I have to undertake. I presume the plaintiff has the opening and closing on this.

Mr. Herndon: If your Honor please, I believe that, so far as plaintiff is concerned, we would be content to submit the matter on the briefs which have heretofore

been filed. Of course, if your Honor had any particular matter that you wished further argument or briefs on, we would be most happy to comply but, as far as we are concerned, I believe that we would be satisfied to submit the cause to your Honor upon the record and upon the briefs heretofore filed.

Mr. McGinley: If your Honor please, my thoughts are in agreement with counsel as to it and I feel that your Honor has thoroughly the case in mind; and, if there is no contrary indication from the court as to any particular point raised by the matters which your Honor has discussed, on which you feel that we, as attorneys, should give further enlightenment, the defendant and counter-claimant is perfectly willing and agreeable to submitting the record as is for the decision of your Honor.

The Court: I must say that this has been a very well [14] prepared and very well presented case. I don't know how any group of lawyers could have done any better. No one tried to get technical. They were all willing to let the evidence go in and let it speak for itself, which I think in a case like this is about all we can do.

These insurance cases aren't very easy for any judge. Of course, the higher courts are up against this. If they go out of their way to decide all points that are available, they are charged with spreading a lot of dicta on the records. If they don't, they are charged with dodging the issues. So far as the nisi prius courts are concerned, I think that it is the obligation of the nisi prius courts to answer all of the contentions, whether the court agrees with them or doesn't agree, and show why he agrees with them or why he doesn't agree with them, and let the upper courts have the benefit of his views. Any one can say, "Judgment for the plaintiff" or "Judgment

for the defendant," and 50 per cent of the time, under the law of averages, he is going to be right. But that is not fair to the attorneys and is not fair to the higher courts. Maybe I talk too much but, when a case goes up, they all know why I decided it and the attorneys below know how I decided it.

This is not an easy case. It has not been easy for either side to present it and it is not an easy case to decide. I am perfectly frank to say I know how I am going to decide this [15] case now. I can't guarantee I am right and, except for the fact that I think that you gentlemen are entitled to a pretty careful decision on your points, I could tell you right now how I am going to decide this case.

I am not at all sure but what I might just as well adjourn for a few minutes or for a little while and informally discuss these points. I think I understand what you have done and I don't know any reason for stalling it off except for the fact that it takes some time. Let me take a recess for five minutes and think about it.

(Short recess.)

The Court: As I say, gentlemen, I hadn't intended to give a decision in this case this morning because I thought that you gentlemen wanted to file further briefs and I was going to organize what I had to say and make a more or less formal job of it, though, under the circumstances, I think you are all familiar with these decisions on these matters. But I think possibly I should indicate the views that I have on the law involved. As there is a good deal of law involved behind the motions which I have acted upon, I shall give you my thoughts behind that first.

The first paragraph of the policy in suit, Plaintiff's Exhibit 3, reads as follows:

"New England Mutual Life Insurance Company of Boston agrees to pay at its home office in [16] Boston, Massachusetts, on receipt of due proof of the death of the insured, Abe Lutz, the face amount, thirteen thousand dollars, to the beneficiary, Harry Lutz, son of the insured, or if deceased, the executors, administrators or assigns of said son, the sole owner of this policy. The beneficiary is appointed without right of revocation, by the insured."

In Part I of the application, the two questions and answers thereto under No. 19 read as follows:

"Is the right to change the beneficiary reserved to the proposed insured? No

"If not, to whom are ownership and control reserved? Harry Lutz."

Part I of the application is signed by Abe Lutz, proposed insured, and Harry Lutz, applicant for insurance.

The plaintiff relies, and properly so, upon the case of Missouri State Life Ins. Co. v. Young, 9th Cir., Feb. 21, 1930, 38 Fed. (2d) 399.

The decision was rendered in reversing the judgment of the District Court for the District of Arizona in an action upon an accident insurance policy for \$30,000 issued to George U. Young in favor of his wife, the appellee. I won't discuss the facts although I have them all outlined here, as you are familiar with them. One of the principal questions in the case was the admissibility of declarations of the in- [17] sured made before and after the issuance of the policy concerning his state of health both before and after the date of the policy. The

issue of fraud was based upon statements made by the insured in the application for the policy in question. The insured, in his written application, stated that he had never had diabetes and answered in the negative the following question: "Have you within the past five years had medical or surgical advice or treatment or any departures from good health? If so, state when and what, and duration." With reference to these answers of the insured in his application it was alleged in the answer that the insured, during the five years prior to the date of the application, had had medical advice or treatment and had had departures from good health; and had diabetes; and that the representations made in the application were known by the insured to be false and made with the intention of deceiving the defendant; that such representations were material.

The insured retained the power to change the beneficiary.

A whole page of the opinion, page 400, is devoted to quoting the trial court's instructions on the issue of fraud.

Considerable evidence was adduced as to the ill health of the deceased during the year 1924. Several medical witnesses, in answer to a hypothetical question based upon the evidence adduced before the court, testified that in their judgment the insured suffered from diabetes during the year [18] 1924 and at the time of his application for insurance was suffering from diabetes and that he died as a result of that disease. The jury found to the contrary.

In addition to this evidence, defendant attempted to prove oral and written statements of the deceased indicating his ill health and that he consulted physicians as to his health during the year 1924 and previous thereto

within five years of the issuance of the policy. This evidence was objected to and rejected.

In writing the majority opinion, Judge Wilbur said:

"While the decisions of the state courts are at variance with reference to the admissibility of declarations or admissions of the insured as against the beneficiary seeking to recover for the death of the insured, and the rule has been varied in some states according to whether or not the policy permits the insured to change the beneficiary thereof at will (*McEwen v. N. Y. Life Ins. Co.*, 23 Cal. App. 694, 698, 139 P. 242; *Waring v. Wilcox*, 8 Cal. App. 317, 96 P. 910; *Hopkins v. Northwestern Life Assur. Co.* (CCA 3), 99 F. 199; *Union Mutual Assur. v. Montgomery*, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519; *Mobile Life Ins. Co. v. Morris*, 3 Lea (71 Tenn.) 101, 31 Am. Rep. 631; *Equitable Life Assur. Soc. of U. S. v. Campbell*, 85 Ind. App. 450, 150 N. E. 31, [19] 151 N. E. 682; *Nophsker v. Supreme Council of Royal Arcanum*, 215 Pa. 631, 64 A. 788, 7 Ann. Cas. 646; *Supreme Lodge of Knights of Honor v. Wollschlager*, 22 Colo. 213, 44 P. 598), it seems clear on principle that where the knowledge and intent of the insured in making the representations contained in his application for insurance is a material element in the case as it is here, his statements concerning his condition are admissible for the purpose of determining whether or not false representations made were known by him to be false. The authorities are almost but not quite unanimous in holding that where independent evidence is adduced tending to show that the representations by the insured in his application for insurance were false, the dec-

larations of the insured inconsistent with the facts stated in his application made about the same time are admissible for the purpose of showing his knowledge and intent in making the false representation. *Johnson v. Fraternal Reserve Ass'n.* (1908), 136 Wis. 528, (86 ALR 148n; no W.), 117 N. W. 1019; *Cummings v. Connecticut Life Ins. Co.*, 101 Vt. 73, 142 A. 82 (86 ALR 148 & 151n; W. 18, 266a, 1072, 1081); *McGowan v. Sup. Ct. of Ind. Order of Foresters*, 104 Wis. 173, 80 N. W. 603 (86 ALR 150 & 152n; [20] W. 266a, 1081, 2384); 37 Cor. Jur. 626. There may be some cases holding that even where the beneficiary can be changed at will, and even where there is independent evidence tending to show that the representations made were false, the declarations of deceased were not admissible even to show his intent or knowledge. *Supreme Lodge of Knights of Honor v. Wollschlager*, supra, as to declarations as to age. We do not see how these cases can be sustained on principle."

And he goes on and discusses that matter and he discusses further the questions of evidence.

"We think the question sufficiently indicates the favorable answer expected within the rule applicable to trials where the witness testified in person before the court."

"The trial court also sustained objections to certain letters written in 1924 by the insured indicating that during that year the insured was very ill, that he consulted a physician, and that he was thoroughly aware of his rather desperate physical situation."

And he gives certain samples of these letters.

"These rulings rejecting evidence of the statements of the decedent were erroneous, and [21] the case must be reversed because of these errors."

He then discusses the case of *Logia Suprema, etc., v. Aguirre*, (1913), 14 Ariz. 390, 129 Pac. 503, which I shall not discuss. This case was also discussed by Judges Rudkin and Dietrich.

In *Johnson v. Fraternal Reserve Ass'n*, *supra*, the judgment, after special findings by the jury, was for plaintiff, and the association appealed, and it was affirmed.

To establish the defense of false representations in the deceased insured's application, some members of appellant were called as witnesses and were held incompetent to testify under a Wisconsin statute, because of their interest in the result. After discussing the statute in question, the court said, page 1020 of 117 N. W.:

"The evidence of the witnesses above referred to, which was rejected, related to mere declarations of the deceased made at times so distant from that of the application as to be inadmissible as part of the res gestae and counsel for appellant made no claim to the contrary. It was not admissible as evidence of the main facts, or any of them, viz., that the assured made some false misrepresentation as to her insurability, in that she was or had been afflicted with some one or more of the infirmities in respect to which she was interrogated. Laying aside as mere hearsay such evidence, there was none [22] introduced or offered tending to establish that such main facts or any of them existed. That being so, the

rulings rejecting evidence were harmless, and the similar evidence received did not establish or tend to establish the defense."

He refers also to the celebrated case of McEwen versus New York Life Insurance Co., January 9, 1914, 23 Cal. App. 694, discussed in 86 ALR 150 and 162 NW. I shall not go into a discussion of that case because you are, likewise, familiar with that.

Section 1853 of the Code of Civil Procedure provides as follows:

"Sec. 1853. Declaration of decedent evidence against his successor in interest. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

In that connection, we shall again refer to that McEwen v. New York Life case.

Yore v. Booth, Receiver, December 2, 1895, 110 Cal. 238, 86 ALR 153, was an action by the widow and children of Yore to recover on his life insurance policy issued May 10, 1886, payable to his "legal heirs." From a judgment in favor of plaintiffs, the defendant appealed, and that case was affirmed. [23]

That had involved many of the principles with which we are familiar but was largely a question of the age, but the discussion in the case is very interesting.

Before discussing the case of Jenkin v. Pacific Mutual Life Insurance Co., 131 Cal. 121, which is discussed in 86 ALR at 159, I will quote Wigmore's comment on the case found in footnote 5, on page 87, of Volume VI, un-

der Sec. 1726. Wigmore is discussing Exceptions to the Hearsay Rule—Statements of Mental Condition. And the statement in the text concluding with the footnote reference is as follows:

“In a number of precedents sundry declarations of intention (to make a journey, to pay money, or the like) have been excluded, usually without any other apparent reason than the supposed application of the ‘res gestae’ doctrine.”

The portion of the footnote referred to reads as follows:

“Occasionally such statements are excluded merely because some other principle is alone invoked and the present one is ignored,” citing the Jenkins v. Insurance Company, 131 Cal. 121; “that is, for example, the narrow ground that they were not admissions usable against the beneficiary of an insurance policy; see this rule ante, Sec. 1081.”

The Jenkins case was an action brought by the assignee of the beneficiary of an accident policy issued to one Crosbie. [24] A judgment was for defendant, and plaintiff appealed, and the decision was reversed. That case you are familiar with and I don't intend to go into it any further.

The same is also true in the case of Mah See v. North American Accident Insurance Co., 190 Cal. 421, and Pacz v. Mutual Indemnity, etc. Insurance Co., 116 Cal. App. 654.

Wigmore on Evidence, Third Edition, Section 266, pages 87-91, contains a very good discussion of this entire matter. I shan't take the time to read it, as you have cited it in your briefs and you are familiar with it.

I have examined the cases in all of the different States but I am not going to bother to discuss them here.

Section 266a, of the same citation, says:

"Nevertheless, the hearsay exception, being subject to certain limitations, and the rule for a party's admissions, will often not suffice for the purpose in hand, and the present, or circumstantial, use of such utterances may become the only available one. For example, in actions on life insurance policies, where the deceased's misrepresentations as to his health are in issue, his statements as to a prior illness would be inadmissible under the hearsay exception to prove that illness, and might also not be receivable as a party's admissions, under Section 1081, and [25] yet, if the fact of the illness were otherwise evidenced, the deceased's statement might be receivable as circumstantial evidence of his knowledge of it."

And he cites the Federal and State decisions on that rule.

Then, in Section 1076, "Admissions of other parties to the litigation; nominal and real parties; representative parties, and so on, he says, under Section 1081:

"The principle examined in Section 1080 may be phrased in this way: When by the hypothesis of the party himself his title as now claimed is identical with that of another person, as a prior holder, the statements of that other person, made during the time of his supposed title, are receivable against the party as admissions.

"This question of identify of title depends obviously upon the substantive law of property. In this respect it is without the scope of the law of evi-

dence, and does not call for consideration here. But a few of the commoner instances may be briefly examined for illustration's sake."

And then he goes on and discusses this particular phase of the question in a very able manner and it is interesting here to us only by analogy. The cases are exhaustively analyzed, [26] and a tenable distinction lucidly expounded, in an article by Professor Albert M. Kales, 6 Columbia Law Review 509, and the more recent article in St. John's Law Review, 1934, Vol. VIII, 258, upon admissibility of declarations of the insured in life insurance litigation.

In Vol. VI of Wigmore on Evidence, Third Edition, Section 1718, he says, "It is for statements of physical pain or suffering that the exception has been longest recognized and the principle most fully and clearly reasoned out. The general principle is illustrated in the following passages:

"1845, Shepley, J., in Kennard v. Burton, 25 Me. 46: 'If other persons could not be permitted to testify to them (complaints of suffering) when the person injured might be a witness, there might often be a defect of proof. The person injured might be unable to recollect or state them by reason of the agitation and suffering occasioned by it.'"

Then, from Bigelow, J., 1851, in Bacon v. Charlton, 7 Cush. 586:

"Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration that such

expressions are the natural and necessary language of emotion, of the existence of which, from the very [27] nature of the case, there can be no other evidence. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady."

That is a careful discussion of the question.

The two Law Review articles, referred to by Wigmore, are very interesting, as well as 86 ALR 146, in 1933, admissibility as against the beneficiary of life or accident insurance of statements or declarations by the insured outside of his application.

I refer you particularly here to Mutual Life Insurance Co. of New York v. Selby, Ninth Circuit, from D. of Wash., February 3, 1896, 72 Fed. 980, 86 ALR 147; to Connecticut Mutual Life Insurance Company v. Hillmon, January 2, 1903, 188 U. S. 208.

I refer you also to Langdeau v. John Hancock Mutual Life Insurance Co., February 26, 1907, 194 Mass. 56, 80 N. E. 452, and the careful discussion of the subject and the citations there. Also Spaulding v. Mutual Life Insurance Co., January 7, 1920, 94 Vt. 42, 109 Atl. 22, ALR 148, where there was a [28] considerable discussion of the situation and where the court says:

"The rule is well established that where a person procures insurance upon his life for the benefit of

another, the policy and the money to become due thereunder belong to the beneficiary named therein, and the insured has no power to change the interest of the beneficiary, unless a power of revocation or modification is reserved by the terms of the policy," citing cases.

"It is doubtless true that by weight of authority the insured's admissions or declarations, not so made as to be part of the res gestae, are inadmissible against the beneficiary having a vested interest in the policy, at least as proof of the facts stated."

I underlined that last statement.

"14 R. C. L. 1438 and cases there digested. The rule is apparently based upon the ground that the contract is between the insurer and the beneficiary, and the insured is not a party to the suit."

It seems that, even in such case, the evidence should be held admissible to show the insured's knowledge of his condition, and that it was fraudulently represented in the application. Professor Wigmore says that in actions on life insurance policies, where the deceased's misrepresentations as to [29] his health are in issue, his statements as to a prior illness would be inadmissible under the hearsay exception to prove that illness, and might not also be receivable as a party's admissions; and yet, if the fact of the illness were otherwise evidenced, the deceased's statements might be receivable as circumstantial evidence of his knowledge of it," citing cases.

I refer you also to *Hews v. Equitable Life Assurance Society*, Third Circuit, from the Western District of Pennsylvania, 143 Fed. 850, and *Self v. New York Life*

Insurance Co., an Eighth Circuit Court case, which has been cited, 56 F. (2d) 364.

The Self case has been cited on the admissibility point in Prudential Insurance Co. of America v. Loewenstein, 76 F. (2d) 479, and in Aetna Life Insurance C. v. McAdoo, Eighth Circuit, 106 F. (2d) 618, which is the case relied upon so heavily by the defendant on the question of a limited waiver, wherein the court said:

“The next matter of evidence is the exclusion of various statements made to appellee by the insured as to his state of health at various times prior to the issuance of the original policy and thereafter. This evidence is not admissible under the decisions of Arkansas. It would be admissible under the rule announced by this court, in an appeal [30] from the Eastern District of Arkansas, in Self v. New York Life Insurance Co., 8 Cir., 56 F. 2d 364, 366, since the policies sued on gave the insured the right to change beneficiary. As a practical matter, we need not resolve this conflict in decision. This is so because, for other reasons stated in this opinion, the case must be remanded and, on retrial, will be subject to Rule 43(a) of the new Rules of Civil Procedure for the District Courts, 28 U. S. C. A., following Section 723c. Under that Rule, such evidence will be admissible.”

I have already cited the Prudential Insurance case and I don't need to discuss that further.

Despite the confusion in the cases, the conclusion is as I have indicated in my rulings on these motions to strike. I think that that covers the basis for my decisions on these motions to strike and, after all, that is the crux of the matter.

I have listened to the matter very carefully. I think that the insured knew his physical condition. I think the evidence showed that he did and he did to my satisfaction. I think the evidence showed that those misrepresentations were material; that, if they had been familiar with the facts as they actually existed, the insurance policy would never have been written. I don't think that the defense that the defendant was illiterate is sound for the reasons indicated in the plaintiff's brief, which are so fundamental that I need not go into a discussion of them. Here was a very shrewd man. He had accumulated a fortune and had a large income. I had quite a number of clients in my day that would never read a document at all but they would make me read it to them, some of them, because they didn't understand English very well, and some felt they could get it better through their ears. This man evidently was very careful about having documents read to him by his lawyer, his accountant, his son or a son-in-law, all of whom were very intelligent men. And I think that he knew what he was signing and I think he knew what the policy provided.

I feel that, taking the evidence all together as it gradually developed from the trial of it, there was a clear intention to waive the privilege as I have indicated. When that privilege is waived, the evidence, to me, is conclusive.

The judgment will be for the plaintiff as prayed and against the defendant on the affirmative defenses and on the counter-claim.

I think that you gentlemen will have to get together on the form of the findings and the conclusions and the form of the decree.

As I understand it, the defendant is entitled to a return of the premiums paid, which were previously tendered. I [32] haven't gone into the question about the interest on that tender after it was declined. My offhand understanding of the law is that, when a tender is once made properly, that that stops the running of interest when it is declined. I think that probably you gentlemen can get together on that.

I don't think I need to go on and discuss this matter any further. You gentlemen are so thoroughly familiar with the facts and so thoroughly familiar with these decisions that I don't think it is necessary. I don't say that there isn't any question about it and that I am right. I just think I am right but the Circuit Court of Appeals may think I am wrong. If I have decided it wrongly, it isn't because I haven't paid very careful attention to it.

Mr. McGinley: May I say this, your Honor? In every controversy there must be a victor and a loser. I want to congratulate the other side and I also want to express my appreciation of the study and the courtesy that have been extended to us during the trial of this case.

The Court: It was very well presented, and it was very carefully done. I think the Circuit Court of Appeals is getting the whole thing if it goes to appeal and that the interests of both sides have been protected.

Mr. Herndon: If your Honor please, I want to reciprocate counsel's statement. It has been a pleasure to try the case against courteous and careful counsel and

we all appreciate [33] the care and thought with which your Honor has tried it.

The Court: If you gentlemen will get together on the form of these documents, I am pretty busily engaged with the criminal calendar, after having had the influenza, and the more you can relieve me, the better it is going to be. The more you can agree on these papers, the better, and bring them in. Can you get them done in three days, do you think?

Mr. Herndon: Yes; I think so, your Honor. I am quite sure, if we can get a draft of the findings to counsel within the next two or three days, we can adjust any differences there may be.

The Court: Yes. Of course, under our system here, you can't change the court's decisions or the findings and you are not prejudicing your position by approving it as to form, in line with the court's views. You protected your position during the trial, and these findings are to reflect my views of the facts and the law. They don't change your position on the case.

Mr. McGinley: Might I ask one question? In connection with the preparation of the findings, particularly as to the defenses of waiver and estoppel, is there sufficient on those specific defenses, as indicated by your Honor, to enable counsel to make appropriate findings on those defenses?

The Court: I think so. You can just go through it and say it is true as to this and not as to that and that will [34] save a lot of trouble, just like they do in the State courts.

[Endorsed]: Filed Nov. 9, 1945. [35]

[Endorsed]: No. 11180. United States Circuit Court of Appeals for the Ninth Circuit. Harry Lutz and Harry Lutz and Rose Lutz, as executor and executrix of the last will and testament of Abe Lutz, Deceased, Appellant, vs. New England Mutual Life Insurance Company of Boston, a corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed November 13, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States
in and for the Ninth Circuit

No. 11180

HARRY LUTZ and HARRY LUTZ and ROSE LUTZ,
as Executor and Executrix of the Last Will and Testa-
ment of Abe Lutz, Deceased,

Appellants,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY OF BOSTON, a corporation,

Appellee.

CONCISE STATEMENT OF POINTS ON APPEAL
AND DESIGNATION OF PARTS OF RECORD
ON APPEAL UNDER RULE 19(6) OF THIS
COURT

Notice Is Hereby Given that at the hearing of this appeal, appellants will rely upon, and hereby formally adopt, the concise statement of points on appeal under Rule 19(6), filed in the District Court of the United States, Southern District of California, Central Division, on the 7th day of September, 1945, and appellants hereby designate the following identified portions of the record which they think necessary for the consideration of the appeal, said portions being parts of the records, proceedings and evidence contained in the original certified record transmitted by the Clerk of the United States District Court, for the Southern District, Central Division, pur-

suant to defendants'-appellants' designation of portions of the record on appeal, filed with said Court on the 7th day of September, 1945:

* * * * *

Dated: October 30, 1945.

McLAUGHLIN & McGINLEY
JOHN P. McGINLEY
W. L. BAUGH

Attorneys for Appellants Harry Lutz and
Harry Lutz and Rose Lutz as Executor
and Executrix of the Last Will and
Testament of Abe Lutz, Deceased

Address: 1224 Bank of America Bldg.

Received copy of the within Concise Statement of Points on Appeal and Designation of Parts of Record on Appeal Under Rule 19(6) of This Court, this 30th day of October, 1945. Meserve, Mumper & Hughes, by Roy L. Herndon, Attorneys for Appellee.

[Endorsed]: Filed Nov. 13, 1945. Paul P. O'Brien,
Clerk.

